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UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

ARTHUR GOLDBERG, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON,

Defendants.

No. 4344.
Civil.

VOL. I.

**DOCKET ENTRIES.**

| | | |
|---|---|---|
| October | 13, 1961 | Filed Complaint |
| November | 1, 1961 | Filed Answer of Defendant |
| November | 2, 1961 | Filed Interrogatories by Defendants |
| November | 4, 1961 | Filed Plaintiff's Interrogatories to Steepleton General Tire Company, Inc., Defendant |
| November | 13, 1961 | Filed Plaintiff's Objections to Defendant's Interrogatories |
| November | 13, 1961 | Filed Objections to Interrogatories by Defendant |
| November | 24, 1961 | Filed Plaintiff's Reply to Defendant's Objections to Interrogatories |
| November | 30, 1961 | Filed Notice to Take Deposition Upon Oral Examination |
| November | 30, 1961 | Filed Notice to Take Deposition Upon Oral Examination |

*Docket Entries*

| | |
|---|---|
| December 8, 1961 | Filed Notice to Take Depositions Upon Oral Examination |
| December 8, 1961 | Filed Amended Notice to Take Depositions Upon Oral Examination |
| December 18, 1961 | Filed Notice to Take Depositions Upon Oral Examination by Plaintiff |
| December 22, 1961 | Filed Notice to Take Deposition Upon Oral Examination |
| January 5, 1962 | Filed Notice to Take Depositions upon Oral Examination—Mr. R. E. Hedlund |
| February 20, 1962 | Filed Amendment to Complaint, Consented to by Defendant |
| February 20, 1962 | Filed Answer to Amendment to Complaint, Consented to by Plaintiff |
| February 20, 1962 | Filed Motion for Production of Documents |
| February 23, 1962 | Filed Affidavit of James H. Micklish |
| February 23, 1962 | Filed Notice to Take Depositions Upon Oral Examination |
| February 28, 1962 | Filed Request For Admission of Facts |
| March 1, 1962 | Filed Order On Motion For Production of Documents |
| March 5, 1962 | Filed Objections to Requested Admission of Facts |
| March 5, 1962 | Filed Motion and Notice of Motion |
| March 8, 1962 | Filed Supplemental Request for Admission of Facts |
| March 16, 1962 | Filed Motion and Notice of Motion |

*Docket Entries*

| | | |
|---|---|---|
| March | 16, 1962 | Filed Objections to Supplemental Request for Admission of Facts |
| March | 23, 1962 | Filed Order on Objections to Plaintiff's Request for Admission of Facts and Supplemental Request for Admission of Facts |
| March | 30, 1962 | Filed Replies to Request and Supplemental Request for Admission of Facts |
| March | 30, 1962 | Filed Replies to Request and Supplemental Request for Admission of Facts |
| May | 11, 1962 | Filed Deposition of Winston W. Marsh |
| May | 11, 1962 | Filed Deposition of Reuben E. Hedlund |
| May | 11, 1962 | Filed Deposition of Milan Zaveson |
| May | 11, 1962 | Filed Deposition of Raymond L. Davis |
| May | 11, 1962 | Filed Deposition of E. A. Henderscheid |
| May | 11, 1962 | Filed Deposition of Ted Curry |
| May | 11, 1962 | Filed Deposition of Robert L. Sawyer |
| May | 11, 1962 | Filed Deposition of James Herman Micklish, Part 1 |
| May | 11, 1962 | Filed Deposition of James Herman Micklish, Part 2 |
| May | 21, 1962 | Filed Deposition of Mr. A. E. Steepleton |

*Docket Entries*

| | | |
|---|---|---|
| May | 23, 1962 | Filed Deposition of Miss Virginia Lauderdale |
| July | 27, 1962 | Filed Findings of Fact, Conclusions of Law and Order for Judgment |
| July | 31, 1962 | Filed Motion to Amend Findings of Fact, Conclusions of Law and Order for Judgment |
| July | 31, 1962 | Filed Final Decree |
| August | 2, 1962 | Filed Order Amending Order for Judgment by Striking the Words "at the Plaintiff's cost" from Paragraph VII |
| September | 27, 1962 | Filed Notice of Appeal |
| September | 27, 1962 | Filed Notice of Cross-Appeal as to Part of the Judgment |
| September | 27, 1962 | Filed $250.00 Appeal Bond |
| October | 22, 1962 | Filed Reporter's Transcript—7 Volumes |

**Certificate.**

I, W. Lloyd Johnson, Clerk of the United States District Court for the Western District of Tennessee, do hereby certify that the above index of docket entries is a true and correct copy of all relevant docket entries which appear on the docket in this office.

This first day of November, 1962.

W. LLOYD JOHNSON,
Clerk,

By V. LaFON,
Deputy Clerk.

(Seal)

*Clerk's Certificate*

UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

ARTHUR GOLDBERG, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs

STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON,

Defendants.

No. 4344.
Civil.

**CLERK'S CERTIFICATE.**

I, W. Lloyd Johnson, Clerk of the United States District Court for the Western District of Tennessee, do hereby certify that the papers and exhibits transmitted herewith and enumerated below comprise the Record on Appeal in the above entitled matter.

1. Complaint
2. Answer of Defendant
3. Interrogatories by Defendants
4. Plaintiff's Interrogatories to Steepleton General Tire Company, Inc., Defendant
5. Plaintiff's Objections to Defendant's Interrogatories
6. Objections to Interrogatories by Defendant
7. Plaintiff's Reply to Defendant's Objections to Interrogatories
8. Notice to Take Deposition Upon Oral Examination

9. Notice to Take Deposition Upon Oral Examination

10. Notice to Take Depositions Upon Oral Examination

11. Amended Notice to Take Depositions Upon Oral Examination

12. Notice to Take Depositions Upon Oral Examination by Plaintiff

13. Notice to Take Deposition Upon Oral Examination

14. Notice to Take Depositions upon Oral Examination—Mr. R. E. Hedlund

15. Amendment to Complaint, Consented to by Defendant

16. Answer to Amendment to Complaint, Consented to by Plaintiff

17. Motion for Production of Documents

18. Affidavit of James H. Micklish

19. Notice to Take Depositions Upon Oral Examination

20. Request for Admission of Facts

21. Order on Motion for Production of Documents

22. Objections to Requested Admission of Facts

23. Motion and Notice of Motion

24. Supplemental Request for Admission of Facts

25. Motion and Notice of Motion

26. Objections to Supplemental Request for Admission of Facts

27. Order on Objections to Plaintiff's Request for Admission of Facts and Supplemental Request for Admission of Facts

*Clerk's Certificate*

28. Replies to Request and Supplemental Request for Admission of Facts

29. Replies to Request and Supplemental Request for Admission of Facts

30. Deposition of Winston W. Marsh, with exhibits attached

31. Deposition of Reuben E. Hedlund, with exhibits 1 through 4 attached

32. Deposition of Milan Zaveson, with exhibits 1 through 6 attached

33. Deposition of Raymond L. Davis, with exhibits 1 through 3 attached

34. Deposition of E. A. Henderscheid, with Firestone exhibits A through K attached

35. Deposition of Ted Curry, with B. F. Goodrich exhibits 1 through 10 attached

36. Deposition of Robert L. Sawyer

37. Deposition of James Herman Micklish, Part I, with exhibits 1 through 7 attached

38. Deposition of James Herman Micklish, Part II

39. Deposition of Mr. A. E. Steepleton

40. Deposition of Miss Virginia Lauderdale

41. Findings of Fact, Conclusions of Law and Order for Judgment

42. Motion to Amend Findings of Fact, Conclusions of Law and Order for Judgment

43. Final Decree

44. Order Amending Order for Judgment by Striking the Words "at the Plaintiff's cost" from Paragraph VII

45. Notice of Appeal

46. Notice of Cross-Appeal as to Part of the Judgment

47. Reporter's Transcript—7 Volumes

In Witness Whereof, I have hereto subscribed my name and affixed the Seal of said Court at Memphis in said District, this 2nd day of November, 1962.

W. LLOYD JOHNSON,
Clerk,

By V. LaFON,
Deputy Clerk.

(Seal)

UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

| | |
|---|---|
| ARTHUR GOLDBERG, Secretary of Labor, United States Department of Labor, Plaintiff, vs. STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON, Defendants. | Civil Action. File No. 4344. |

**COMPLAINT.**

(Filed Oct. 13, 1961.)

I.

Plaintiff brings this action to enjoin the defendants from violating the provisions of Sections 15 (a) (1), 15 (a) (2)

and 15 (a) (5) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U. S. C. 201, et seq.), hereinafter referred to as the Act.

II.

Jurisdiction is conferred upon the court by Section 17 of the Act and by Section 24 (8) of the Judicial Code, revised effective September 1, 1948, 28 U. S. C. 1337.

III.

The defendant Steepleton General Tire Company, Inc. is a corporation organized and existing under the laws of the State of Tennessee, having its principal office and place of business in Memphis, Shelby County, Tennessee, within the jurisdiction of this court, where it is engaged in the production, sale and servicing of new and recapped tires.

The defendant A. E. Steepleton, who resides in Memphis, Shelby County, Tennessee, within the jurisdiction of this court, is now and at all times hereinafter mentioned has been president of the defendant Steepleton General Tire Company, Inc., in which position he has actively managed and controlled the operations of the corporate defendant.

IV.

At all times hereinafter mentioned the defendants have employed and are employing approximately forty-seven (47) employees in the production, handling, servicing, selling and distributing of new and recapped tires. Substantial quantities of the tires produced, handled, serviced, sold and distributed by the defendants' said employees have been, and are being, produced for commerce as de-

fined by the Act and have been, and are being, received, transported, offered for transportation, shipped, delivered and sold into and from states other than the State of Tennessee, and have been, and are being, shipped, delivered and sold with knowledge that shipment, delivery and sale thereof in commerce is intended from defendants' business premises in Tennessee to other states. By reason of their activities, as aforesaid, the defendants and their employees are engaged in commerce and in the production of goods for commerce as defined by the Act.

V.

During the period since May 1, 1959, the defendants repeatedly have violated and are violating the provisions of Sections 7 and 15 (a) (2) of the Act by employing many of their employees in commerce and in the production of goods for interstate commerce, within the meaning of the Act, for workweeks longer than forty (40) hours, without compensating the employees for such excess hours of employment at rates not less than one and one-half (1½) times the regular rates at which they are employed.

VI.

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11 (c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours and other conditions and practices of employment to be made, kept and preserved by every employer subject to any provision of the Act. The said regulations and amendments thereto were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII.

During the period since May 1, 1959, the defendants, employers subject to the provisions of the Act, repeatedly have violated and are violating the provisions of Sections 11 (c) and 15 (a) (5) of the Act in that they have failed to make, keep and preserve adequate and accurate records of the wages, hours and other conditions and practices of employment maintained by them, as prescribed by the aforesaid regulations, with respect to their employees.

VIII.

During the period since May 1, 1959, the defendants have violated, and are violating, the provisions of Section 15 (a) (1) of the Act in that they have transported, offered for transportation, shipped, delivered or sold in commerce and have shipped, delivered or sold with knowledge that shipment, delivery or sale thereof in commerce was intended, from their said place of business to other states goods, to wit, tires, in the production of which many of their employees were employed in violation of Sections 6 and 7 of the Act, as alleged.

IX.

The defendants have, since May 1, 1959, repeatedly violated the aforementioned provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff prays judgment permanently enjoining and restraining the defendants, their officers, agents, servants, employees, attorneys and all persons acting or claiming to act in their behalf and interest, from violating the provisions of Sec-

tions 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the Act, and for such other and further relief as may be necessary or appropriate.

CHARLES DONAHUE,
CHARLES DONAHUE,
Solicitor,

JETER S. RAY,
JETER S. RAY,
Regional Attorney,

FRANCIS J. STEINER, JR.,
FRANCIS J. STEINER, JR.,
Attorney,

United States Department of Labor.

Post Office Addresses:

U. S. Department of Labor,
Office of the Solicitor,
725 U. S. Courthouse,
801 Broad Street,
Nashville 3, Tennessee,

or

U. S. Department of Labor,
Office of the Solicitor,
Washington 25, D. C.

UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON,

Defendants.

Civil Action.
No. 4344.

**ANSWER.**

Come now the defendants, Steepleton General Tire Company, Inc., and A. E. Steepleton, and, for answer to the complaint herein, state:

(1) On information and belief defendants admit the allegations of Paragraph I of the complaint insofar as same pertain to plaintiff's purpose or object in filing his complaint.

(2) Defendants admit the allegations of Paragraph II of the complaint.

(3) Defendants admit their status, residency and relationship as alleged in Paragraph III of the complaint; defendants deny that Steepleton General Tire Company, Inc., hereinafter referred to as the Company, has been engaged in the production of goods as defined by the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 201 et seq.), hereinafter referred to as the Act, and deny all other allegations of paragraph III of the complaint.

(4) Defendants deny that the Company, at any time mentioned in the complaint, employed as many as forty-seven (47) employees in addition to its employees specifically excluded from coverage of Sections 6 and 7 of the Act by Sections 13 (a) (1), 13 (a) (2) or 13 (a) (4) thereof; deny that the Company engaged in the production of any goods for commerce as defined in the Act; deny that any substantial quantity of tires were sold or distributed by the Company in commerce as defined by the Act, and deny all other allegations of Paragraph IV of the complaint.

(5) Defendants deny that they violated Section 7 of the Act and therefore deny any violation of Section 15 (a) (2) thereof as alleged in Paragraph V of the complaint.

(6) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph VI of the complaint that regulations were issued, promulgated, published and are known as there alleged, and strict proof thereof is demanded; defendants deny that said regulations affect or apply to the defendants or any other employer exempted or excluded from coverage by the Act by specific provisions thereof; deny that said regulations accurately reflect the section of the Act pursuant to which they were purportedly issued and therefore deny that said regulations are valid or were in fact or substance authorized by said Act.

(7) Defendants deny that they violated Section 11 (c) of the Act and therefore deny violation of Section 15 (a) (5) thereof as alleged in Paragraph VII of the complaint; defendants aver that the Company makes, keeps and preserves adequate, accurate payroll and other records with respect to its employees which comply fully with the requirements of all laws affecting, concerning or controlling defendants and aver that defendants are not

affected or controlled by Section 11 (c) of the Act, but are specifically exempted and excluded from coverage thereunder.

(8) Defendants deny that the Company has, during the period since May 1, 1959, engaged in the production of tires or other goods as defined by the Act; deny that the Company was covered by or could have violated Sections 6 and 7 of said Act during such period, deny that said sections apply to or affect the Company, therefore deny any violation of Section 15 (a) (1) of said Act as alleged in Paragraph VIII of the complaint; and deny all other allegations in the said Paragraph.

(9) Defendants deny all violations of provisions of the Act alleged in Paragraph IX of the complaint; deny that any section thereof authorizes any judgment against defendants; deny that complainant is entitled to any relief and deny that there is any basis upon which complainant should be granted any relief.

And now having answered the allegations of the complaint, defendants, without waiving but expressly relying upon all the above defenses and denials, also rely upon the following defenses:

(A) The Company is and during the period since May 1, 1959 has been engaged in the sale of new and recapped tires at retail.

(B) The Company is and at all times during such period has been an exempt "retail" establishment as defined in Section 13 (a) (2) of the Act; the Company at all such times has also qualified under Section 13 (a) (4) of the Act; therefore the provisions of Sections 6 and 7 of the Act relied upon by the plaintiff do not apply with respect to the Company.

(C) Section 13 (a) (2) of the Act provides in part that sales "recognized as retail sales or services in the particular industry" in which an employer is engaged shall be considered retail sales for purposes of this Section; Section 13 (a) (4) of the Act provides in part that the recognition of an employer "as a retail establishment in the particular industry" in which it is engaged shall determine whether a given employer qualifies as an exempt retail establishment for purposes of this Section. These mandatory provisions were ignored or violated when directives, bulletins and other publications by the Department of Labor, binding upon its agents and employees, were promulgated and published. Contrary to these provisions such bulletins and directives classify sales recognized as retail sales in the tire industry by vendors recognized as retail establishments in the tire industry as non-retail sales by non-retailers. Such bulletins and directives are contrary to the classifications recognized in the tire industry expressed by leaders in that industry at hearings preceding the publication of same. Such bulletins and directives are contrary to express legislative mandate and therefore are invalid. Pursuant to such invalid publications plaintiff's agents and employees conducted an extensive investigation of and made completely inaccurate and unwarranted findings in respect to the Company, which inaccurate, unwarranted and invalid findings serve as the basis for the complaint.

(D) Section 6 of the Act, also relied upon in the complaint, does not apply to the Company because it is exempt therefrom pursuant to Section 13 (a) (2) and because the minimum wage of $1.00 per hour has been maintained by the Company.

(E) Section 11 (c) of the Act relied upon in the complaint applies only to employers subject to some other

provision of the Act or subject to some order issued thereunder; the defendants are not subject to any provision of the Act and are not the recipients of any order thereunder.

(F) These defendants have not violated those Sections of the Act which would make Sections 15 (a) (1), 15 (a) (2) or 15 (a) (5) thereof applicable as alleged in the complaint.

(G) In this suit plaintiff attempts to have this Court sanction and enforce invalid and illegal bulletins and directives which are contrary to and in violation of express, mandatory provisions in the sections of the Act to which such publications refer and by which plaintiff would have this Court believe such publications were authorized.

Wherefore, defendants pray that they be allowed to go hence with their proper costs.

BURCH, PORTER & JOHNSON,
By TOM MITCHELL, JR.,
Attorneys for Defendants.

I, Tom Mitchell, Jr., certify that the foregoing answer was served upon plaintiff by mailing copies, postage prepaid, to one of plaintiff's attorneys of record addressed as follows:

Jeter S. Ray, Regional Attorney
U. S. Department of Labor
Office of the Solicitor
725 U. S. Courthouse
801 Broad Street
Nashville 3, Tennessee

This 1st day of November, 1961.

TOM MITCHELL, JR.,
TOM MITCHELL, JR.

*Amendment to Complaint*

UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

| | |
|---|---|
| ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor, Plaintiff, vs. STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON, Defendants. | Civil Action. No. 4344. |

**AMENDMENT TO COMPLAINT.**

Pursuant to Rule 15 (a), Federal Rules of Civil Procedure, and by written consent of the defendants as evidenced by the endorsement of counsel hereon, the plaintiff amends his complaint heretofore filed by adding thereto immediately following Paragraph No. IV and immediately preceding Paragraph No. V the following:

IV-A.

Since September 3, 1961 the defendants repeatedly have violated and are violating the provisions of Sections 6 (a) (1) and 15 (a) (2) of the Act by paying to many of their employees employed in commerce and in the production of goods for commerce, as aforesaid, wages at rates less than one dollar and fifteen cents ($1.15) an hour.

CHARLES DONAHUE,
Solicitor,
JETER S. RAY,
Regional Attorney,
MARVIN M. TINCHER,
Attorney,
United States Department of Labor,
Attorneys for Plaintiff.

*Answer to Amendment to Complaint*

Defendants consent to the filing of the foregoing amendment by the plaintiff to the complaint in this cause.

BURCH, PORTER and JOHNSON,
By TOM MITCHELL, JR.,
Attorneys for Defendants.

UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

ARTHUR GOLDBERG, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON,

Defendants.

Civil Action.
No. 4344.

**ANSWER TO AMENDMENT TO COMPLAINT.**

Come now the defendants and for answer to the Amendment to Complaint heretofore filed in this cause by plaintiff, state:

Defendants deny that since September 3, 1961 they have repeatedly violated and deny that they are violating Sections 6 (a) (1) and 15 (a) (2) of the Act, deny that employees of the corporate defendant are employed in commerce and deny that said employees are engaged in the production of goods for commerce. The corporate defendant is a retail establishment as defined in Section 13 (a) (4) of the Act; it qualifies as same pursuant to Section 13 (a) (2) thereof. The provisions of Sections 6 and 15 of the

Act relied upon by plaintiff in his Amendment to Complaint do not apply with respect to defendants.

Wherefore, defendants pray that they be allowed to go hence with their proper costs.

BURCH, PORTER & JOHNSON,
By TOM MITCHELL, JR.,
Attorneys for Defendants.

Plaintiff consents to the filing of the foregoing Answer to Amendment to Complaint by defendants; the undersigned attorney for plaintiff acknowledges receipt of a copy of the foregoing Answer to Amendment to Complaint on the 19th day of February, 1962.

/s/ MARVIN M. TINCHER,
Attorney for Plaintiff.

UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

| | |
|---|---|
| ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor,<br>Plaintiff,<br>vs.<br>STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON,<br>Defendants. | Civil Action.<br>File No. 4344. |

**REQUEST FOR ADMISSION OF FACTS.**

Plaintiff Arthur J. Goldberg requests the defendants, Steepleton General Tire Company, Inc., and A. E. Steepleton, within ten days after service of this request to admit

for purposes of this action, subject to all pertinent objections to admissibility which may be interposed at the trial, that each of the Following statements is true:

1. The defendant, Steepleton General Tire Company, Inc.,[1] is the franchised dealer for General Tire and Rubber Company, in the Memphis trade area which includes parts of Arkansas and Mississippi.

2. In carrying on its business the defendant company regularly employs approximately 47 to 50 employees, including approximately 5 to 7 outside salesmen who are employed to call on various commercial and industrial business establishments and local governmental representatives for the purpose of making sales of automotive tires, tubes and tire recapping services.

3. The defendant company has one such salesman who each week calls on customers in Arkansas and another who each week calls on customers in Mississippi. Throughout the period since May 1, 1959, the said defendant repeatedly has made sales of tires, tubes and recapping service to business establishments and local governmental units located in Arkansas and Mississippi.

4. Throughout the period since May 1, 1959, the defendant company has employed several employees in its recapping shop whose duties regularly have included the recapping of automotive tires belonging to customers of the said defendant whose places of business were located in Arkansas and Mississippi. Substantial numbers of such tires, after being recapped, have been transported or delivered by the said defendant for transportation to their owners' places of business in Arkansas and Mississippi.

* * * * * * *

1 Hereinafter this defendant will be referred to herein simply as the defendant company.

*Request for Admission of Facts*

7. The defendant company is billed for the merchandise which it obtains from General Tire and Rubber Company, and it has not been the practice of said defendant to obtain such merchandise on consignment during the period since May 1, 1959.

8. Throughout the period since May 1, 1959, the defendant company repeatedly has obtained tires and other products which were delivered to or received at its place of business directly from points outside the State of Tennessee.

9. Throughout the period since May 1, 1959, the defendant company repeatedly has made sales of tires, tubes and other products and services for resale.

10. The defendant company has a number of employees in its recapping shop and in its service department, who regularly since September 3, 1961, have been paid at rates less than $1.15 an hour.

11. Throughout the period since May 1, 1959, the defendant company has employed a number of employees, including but not necessarily limited to office, recapping shop and service department employees, who regularly have worked in excess of 40 hours per week and who have been compensated for such excess hours of employment at their regular rates of pay rather than at rates not less than one and one-half times the regular rates at which they are employed.

* * * * * * *

13. During the calendar year 1960 the defendant company derived a gross income from its sales of goods and services totalling not less than $903,520.00.

* * * * * * *

*Supplemental Request for Admission*

UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

| | |
|---|---|
| ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor,<br>Plaintiff,<br>vs.<br>STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON,<br>Defendants. | Civil Action.<br>File No. 4344. |

**SUPPLEMENTAL REQUEST FOR ADMISSION OF FACTS.**

Plaintiff Arthur J. Goldberg requests the defendants, Steepleton General Tire Company, Inc., and A. E. Steepleton, within 10 days after service of this request to admit for purposes of this action, subject to all pertinent objections to admissibility which may be interposed at the trial, that each of the following statements is true:

15. During the period beginning January 1, 1960, and ending December 31, 1960, the defendant, Steepleton General Tire Company, Inc.,[1] made one sale or more of truck tires to the customer identified in each of the following subparagraphs:

a. Ace Freight Lines

b. A. S. Barboro, Inc.

c. E. L. Bruce Company

[1] Hereinafter this defendant will be referred to herein simply as the defendant company.

*Supplemental Request for Admission*

d. Carters Garage Company

e. Ray E. Carter Heavy Hauling Company

f. Albert Cook Plumbing Company

g. Delta Oxygen Company

h. John A. Denies Sons Company

i. Desoto Redi-Mix Company

j. Engleberg Packing Company

k. Federal Compress, Blytheville, Arkansas

l. Federal Compress and Warehouse, Memphis, Tennessee

m. Film Transit, Inc.

n. General Outdoor Advertising Company

o. Global Moving and Storage Company

p. Gordon Foods, Inc.

q. Gordon Transports

r. Woody Herrin Produce Company

s. Hoover Motor Express

t. Klinke-Reed Dairies, Inc.

u. Kroger Company

v. Frank Phillips Produce

w. Walter Pitts

x. Robilio & Cuneo

y. Ryder Truck Lines

z. Southwestern Transportation Company

aa. Stewart's, Inc.

bb. Transports, Inc.

cc. Wesson Division, Hunt Foods & Ind. Mechanic Dept.

dd. Wesson Division, Hunt Foods & Ind.

ee. Wesson Oil and Snowdrift Sales Company

ff. Wharton Transports

gg. White Rose Industrial Laundry

hh. H. R. Yost

16. During the period beginning January 1, 1960, and ending December 31, 1960, that customer of the defendant company identified in each of the following subparagraphs operated ten or more commercial vehicles:

a. Ace Freight Lines

b. A. S. Barboro, Inc.

c. E. L. Bruce Company

d. Carters Garage Company

e. Ray E. Carter Heavy Hauling Company

f. Albert Cook Plumbing Company

g. Delta Oxygen Company

h. John A. Denies Sons Company

i. Desoto Redi-Mix Company

j. Engleberg Packing Company

k. Federal Compress, Blytheville, Arkansas

l. Federal Compress and Warehouse, Memphis, Tennessee

m. Film Transit, Inc.

*Supplemental Request for Admission*

n. General Outdoor Advertising Company

o. Global Moving and Storage Company

p. Gordon Foods, Inc.

q. Gordon Transports

r. Woody Herrin Produce Company

s. Hoover Motor Express

t. Klinke-Reed Dairies, Inc.

u. Kroger Company

v. Frank Phillips Produce

w. Walter Pitts

x. Robilio & Cuneo

y. Ryder Truck Lines

z. Southwestern Transportation Company

aa. Stewart's Inc.

bb. Transports, Inc.

cc. Wesson Division, Hunt Foods & Ind. Mechanic Dept.

dd. Wesson Division, Hunt Foods & Ind.

ee. Wesson Oil and Snowdrift Sales Company

ff. Wharton Transports

gg. White Rose Industrial Laundry

hh. H. R. Yost

* * * * * * *

In the
UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

| | |
|---|---|
| ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor,<br>Plaintiff,<br>vs.<br>STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON,<br>Defendants. | Civil Action.<br>File No. 4344. |

**REPLIES TO REQUEST AND SUPPLEMENTAL REQUEST FOR ADMISSION OF FACTS.**

State of Tennessee, }
County of Shelby. } ss.

A. E. Steepleton, one of the defendants in the above entitled action, makes the following replies to the items noted below in the request and the supplemental request for admission of facts filed herein by plaintiff as required by an order herein dated March 23, 1962, requiring answers to certain items in the said request and supplemental requests by one or the other of the two defendants herein, with leave to qualify or explain such replies as necessary in the circumstances.

1. There is no written franchise agreement and no other written agreement between General Tire & Rubber Company and Steepleton General Tire Company; Steepleton General Tire Company, hereinafter sometimes referred to as the Company, is an independent tire retailer which sells

General Tire & Rubber Company tires, tubes and to a lesser extent, sells other products. The Company has no exclusive right as a retailer of General Tire & Rubber Company products over or in any geographic area. The Company's store is located in Memphis, Tennessee. Memphis, Tennessee lies at the extreme southwest corner of the State of Tennessee. The Company's customers principally come from the State of Tennessee, although some of the Company's customers reside or have places of business in the adjacent two states, namely, Arkansas and Mississippi.

2. During 1960 the Company regularly employed approximately forty-seven employees. Included among these employees were the corporate officers, drivers of service and delivery trucks, and approximately six salesmen who called upon and sought to make sales to people or businesses operating any type of equipment which uses pneumatic tires.

3. During 1960 nearby areas to the north, south, east and west of the Company's store was served by one or more of its salesmen. The interval between calls upon customers by a salesman at a given point varied from place to place and from time to time. Because the Company's store is located near the southwest corner of the State of Tennessee, some of the nearby areas to the south and to the west extend into the states of Mississippi and Arkansas, respectively. The volume and value of the Company's sales to customers in North Mississippi during 1960 was so small that the regular solicitation of sales from customers in that area by a Company salesman was discontinued during 1961.

4. The regular duty of employees in the Company's tire recapping department was and is to recap tires for the Company's customers. Some of these customers have places of business located in Arkansas or in Mississippi.

The recapping done for such customers is not a "substantial" part but is, on the contrary, a small percentage of all recapping done by the Company. After tires belonging to such customers had been recapped they were either picked up by the customer, shipped back to the customer via truck line or delivered in the Company's trucks. The method of delivery of recapped tires back to the customers who owned same varied according to the customers' practices or preferences, the number and size of tires and other factors.

7. This statement is correct.

8. This statement is incorrect. During 1960 and thereafter, the Company placed almost all of its orders for tires, tubes or other products which it purchased from General Tire & Rubber Company by telephone to a warehouse of General Tire & Rubber Company located in Memphis, Tennessee. Occasionally, the Company placed such an order through a representative of General Tire & Rubber Company who called at the Company's store. The orders in either event were filled out of stock in the General Tire & Rubber Company warehouse in Memphis, Tennessee; the merchandise was delivered to the Company store or picked up by Company truck, depending upon the size of the order. Occasionally an order could not be completely filled out of stock then in the Memphis warehouse of General Tire & Rubber Company. This happened only rarely. When it did happen, the balance of such order was filled out of stock in a General Tire & Rubber Company warehouse at some other point and delivered to the Company store by whatever was the most efficient means of transportation from such other point.

9. The Company during 1960 made sales of products for resale; sales of services for resale are not considered or identified as a separate part of any transaction by the

Company. The Company's sales for resale during 1960 and at other times were kept to a minimum by three factors:

a. The price of the Company's tires is generally higher than competitors' prices; thus fewer sales for resale can be made by the Company.

b. The profit element in a sale for resale is smaller than in sales to users of tires, thus less emphasis is placed on this type of business by the Company or by its salesmen.

c. The Company had no customers on an active sub-dealer basis during 1960 to whom the Company regularly supplied an inventory of tires or tubes for resale.

10. This statement is correct.

11. This statement is correct.

The replies to Items 12, 13, 15, 16 and 17 are made by an officer of the Company.

* * * * * * *

13. This statement is accurate.

15. This statement is accurate.

16. The Company does not know and cannot state how many pieces of equipment were operated by any of its customers during 1960, for many reasons, including the following:

a. It will be extremely poor customer relations for a Company representative to inquire of or seek to ascertain from any customer the total number of pieces of equipment for which such customer was purchasing or was maintaining tires at any given time.

b. During 1960 or during any year, the number of pieces of equipment for which many customers purchased tires varied from time to time.

c. The term "vehicle" is ambiguous. By definition in accepted dictionaries a "vehicle" is said to mean a conveyance of some sort used for the purpose of carrying persons or things. Some heavy industrial or construction equipment for which the Company sells tires do not carry persons or things and are not used as conveyances in any way so that they do not constitute "vehicles" so defined. Certain equipment on which tires of the sort sold by the Company are installed may be used for carrying things but such equipment is not generally considered to be "vehicles", for example, wheelbarrows, portable conveyor belts or slides and many types of materials handling devices. Many pieces of equipment on which pneumatic tires are used consist of two or more units, each of which may be considered a "vehicle" by some persons, for example, a tractor and one or more trailer units.

d. The rapid expansion and varied practices of individuals or businesses which lease automobiles, tractors and trailers, industrial, construction or other equipment to users of such equipment complicates and makes it impossible for a tire retailer such as the Company to determine the number of pieces of equipment for which a given customer was buying or was maintaining tires during any given period. Some equipment rental arrangements obligate the lessee to furnish or replace rubber on the equipment, some equipment lease arrangements do not so obligate a lessee. The drivers of tractor-trailer units in some instances own tractors or own trailers which they operate for others. Thus the fact that certain equipment which uses pneumatic tires of the sort sold regularly by the Company may be kept at a particular place of business or that such equipment bears a business name or trademark does not necessarily mean that the business so identified purchases or maintains tires on such equipment.

* * * * * * *

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Tennessee,
Western Division.

| | |
|---|---|
| ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor,<br>Plaintiff,<br>vs.<br>STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON,<br>Defendants. | No. 4344. Civil. |

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.**

(Filed July 27, 1962.)

This cause was heard by the court sitting without a jury upon complaint under the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 201 et seq.) hereinafter referred to as the Act. The court upon the pleadings, the proof, stipulations and briefs of counsel makes the following:

**Findings of Fact.**

1. The defendant Steepleton General Tire Company, Inc., hereinafter referred to as "the Company," is a Tennessee corporation having its office and place of business in Memphis, Tennessee, where at all times material it has been engaged in the business of selling and distributing automotive tires and tubes, and providing tire recapping and repair service.

2. The defendant, A. E. Steepleton at all times since May 1, 1959 has been president of the Company and actively engaged in the management of said Company's business in relation to its work and its employees.

3. During the calendar year 1960, which was stipulated by the parties to be a representative period, the Company's gross income from sales and services to its customers was approximately $903,520.00.

4. Employees of the defendants regularly were employed to make sales and deliveries of merchandise in interstate commerce; to recap tires for delivery to customers located outside Tennessee; to remove, repair, recap and mount tires for use on vehicles operated by customers of the defendants for transporting goods in interstate commerce; and to make and maintain sales and accounting records with reference to sales and service transactions as set out herein.

5. The Company serves customers within a radius of seventy-five (75) miles of Memphis, which is located in the southwest corner of the State of Tennessee with the State of Mississippi immediately to the south and the State of Arkansas to the west. The retail market zone or area of the City of Memphis includes counties in eastern Arkansas, northern Mississippi and West Tennessee.

6. During 1960 the gross value of goods and services sold by the Company to customers with addresses outside of the State of Tennessee was approximately $86,000.00. This amount includes all sales and services billed to all out-of-state customers including those sales completed or services rendered in Memphis.

7. In order to meet the needs of many of its customers, the Company's servicemen do much of their work at cus-

tomers' places of business. The work by such employees is done on week-ends, at night, or whenever vehicles owned by these customers are not in use so that the inspection, repair and replacement of tires interferes as little as possible with the regular business use of such vehicles. The Company's servicemen are also on call at all times including week-ends, nights and holidays to make emergency repairs to or replacement of tires on customers' vehicles so that same can be returned to regular use as promptly as possible.

8. The total receipts from sales and services of the Company was less than one million dollars ($1,000,000.00) during 1960 and has not been as much as one million dollars ($1,000,000.00) in any year of its operation. The value of total sales for resale during 1960 was approximately Fifty-eight Thousand Dollars ($58,000.00) which was some six and one-half per cent (6½%) of the total value of sales and services performed by the Company for that year.

9. In the tire industry sales for resale are recognized to be wholesale sales. Whereas, sales of tires to consumers or users of same are recognized to be retail sales regardless of the character or identity of the purchaser, the use to which the tires may be put, the quantities purchased or the price paid for such tires.

10. Beginning early in 1950 and continuing through 1959 the National Tire Dealers and Retreaders Association, through its executive officer in Washington, D. C., presented extensive memoranda and participated in numerous conferences to develop and explain upon the request of the Wage and Hour Administration the term "retail sale" as recognized in the tire industry. This trade Association's memoranda revealed that a retail sale is recognized in the tire industry as including all sales to consumers or users.

11. The definitions and classification of sales by tire dealers as published by the Wage and Hour Administrator (pages 33 and 34 of the January 1960 Interpretative Bulletin, T. 29 part 779) are contrary to those recognized in the tire industry.

12. A national account transaction in the tire industry is based upon a contract entered into between a tire manufacturer and a user of tires who operates vehicles in different places in the United States. The basic features of national account transaction include:

(a) The setting of the price and other terms of the sale by the tire manufacturer and the national account customer.

(b) The tire dealer does not know the price at which a national account customer purchases tires from the manufacturer.

(c) The expectation and insistence by the manufacturer that its retail dealers will make deliveries to manufacturer's national account customers out of inventory carried by the dealer.

(d) The adjustment of the dealer's purchases account with the manufacturer to credit the dealer for the cost of tires delivered to the manufacturer's national account customer, plus the payment of a commission of 5% to 7% of that cost by the manufacturer to the dealer to compensate him for storing and keeping the tires and for delivering them to the national account customers.

(e) The billing of and collection from the national account customers by the tire manufacturer, not by the tire dealer.

(f) The disallowance of the value of tires delivered by the dealer to national account customers when the

dealer's volume bonus is computed and allowed by the manufacturer.

13. The Company herein is an independent tire dealer which handles products of the General Tire and Rubber Company. In accordance with national account contracts entered into by the General Tire and Rubber Company tires are delivered by its retail outlets but no participation by the dealer, other than the delivery to the customer, is permitted. The deliveries by the Company to General Tire Company's national account customers are not recognized in the tire industry as being sales by the local dealer. Sales taxes are neither collected nor paid by the local dealer on such transactions.

14. For purposes of more complete accounting records and more effective managerial control some tire retailers subdivide their retail sales into separate categories. One covers the sale of tires under deferred payment plans, known among tire retailers as "budget sales", which are sales on installment contracts. Another category of retail sales is known as commercial account sales covering truck tire sales to business firms. The competition among tire dealers for this class of business requires them to make such sales for only a small margin over their cost. Particular salesmen may be assigned by a dealer to specialize in sales of this nature. The dealer segregates commercial accounts in his accounting records so that he can more readily determine the profit or loss realized thereon. Although commercial accounts are sometimes segregated for control purposes, they are recognized in the tire industry as being retail sales since they are made to consumers rather than for resale.

15. (a) The Company is an establishment which serves customers in the retail market area of Memphis, Tennessee, where its only place of business is located.

(b) More than fifty per cent (50%) of the defendant's annual dollar volume of sales of goods and services is made within the State of Tennessee.

(c) More than seventy-five per cent (75%) of the Company's annual dollar volume of sales of goods and services is not for resale and is recognized as retail sales and services in the tire retailing industry.

(d) It is recognized in the retail tire industry that all sales of goods or services to consumers are retail sales. Sales of goods and services which the Company makes for resale constitute approximately six per cent (6%) of the total dollar volume of such sales of goods and services.

(e) The only goods which this defendant makes or processes are the tires which it retreads for its customers, all of which is done at the Company's place of business in Memphis, Tennessee.

(f) More than eighty-five per cent (85%) of this defendant's sales of tires which it retreads for sale are sold within the State of Tennessee.

**Conclusions of Law.**

I.

The Court has jurisdiction of the parties and the subject matter of this litigation.

II.

The defendant herein and its employees are engaged in commerce and in the production of goods for commerce within the meaning of the Act. Its employees are entitled to the benefits of the Act unless the Company herein is found to be exempt therefrom. Title 29, U. S. C., Sec. 201, et seq., Mitchell v. Kentucky Finance Co., 359 U. S. 290.

III.

Defendant, being in commerce, must carry the burden of proving its entitlement to the exempting provisions of the Act. Title 29, U. S. C., Sec. 213 (a) 2, 4; Arnold v. Ben Kanowsky, Inc., 361 U. S. 388.

IV.

Under the facts herein as found by the court more than fifty per cent (50%) of the defendant's annual dollar volume of sales of goods and services is produced within the State of Tennessee. More than eighty-five per cent (85%) of defendant's annual dollar volume of sales of goods and services relative to the tire recapping portion of its business is produced in Tennessee, and more than seventy-five per cent (75%) of its annual dollar volume of sales of goods and services is not for resale. We, therefore, find the defendant herein is a retail and service establishment. Title 29, U. S. C., Sec. 213 (a) 2, 4.

V.

While the exemptions under the Fair Labor Standards Act are to be strictly construed, Arnold v. Ben Kanowsky, supra, the legislative history of the applicable 1949 Amendment to the Act clearly indicates that the "business use test" theretofore adhered to is discarded by the Congress to give recognition to the particular industry's own classification of those sales which are by it considered to be retail sales under the Act. No expansion beyond the letter and plain intent of the Act is necessary in this case to place the defendant under exemption in view of the proof herein including the testimony of knowledgeable persons in the industry. Mitchell v. Kentucky Finance Co., supra, Mitchell v. T. F. Fertilizer Works, 233 F. 2d 284 (C. A 5th, 1956); Boisseau v. Mitchell, 218 F. 2d 734 (C. A. 5th, 1955).

VI.

The court concludes under the facts and circumstances of this case the defendant Company is not subject to the Fair Labor Standards Act, as amended, Title 29, U. S. C., Sec. 201 et seq., since it is a retail and service establishment and exempt from its provisions by reason of sections 13 (a) 2 and 4.

VII.

The complaint herein will be dismissed at the plaintiff's cost.

**Order for Judgment.**

Judgment in accordance with the foregoing Findings of Fact and Conclusions of Law will be entered within five (5) days.

MARION S. BOYD,
United States District Judge.

A True Copy.

Attest:

W. LLOYD JOHNSON,
Clerk,

By J. W. ISELE,
D. C.

7-27-62

(Seal)

*Final Decree*

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Tennessee,
Western Division.

ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor,
Plaintiff,
vs.
STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON,
Defendants.
No. 4344. Civil.

**FINAL DECREE.**

(Filed Jul. 31, 1962.)

This cause came on to be heard by the Court sitting without a jury on May 21, 1962, upon complaint under the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 201, et seq.), the amended complaint, the answer to the complaint and answer to the amended complaint, all pleadings in this cause, the testimony of witnesses, exhibits, stipulations, arguments and briefs of counsel; at the conclusion of which the Court took this cause under advisement;

Thereafter on July 27, 1962, the Court filed in this cause its written findings of fact and conclusions of law which are determinative of the issues presented by the pleadings and by the proof and by which the Court directed the entry of a judgment dismissing the complaint herein at the plaintiff's cost.

*Final Decree*

It is, therefore, Ordered, Adjudged and Decreed by the Court that the complaint of plaintiff, Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, as amended, be and the same is hereby dismissed.

It is further Ordered, Adjudged and Decreed that the written findings of fact and conclusions of law filed herein on July 27, 1962 be and the same are hereby made a part of the record in this cause.

All of which is ordered, adjudged and decreed this 31st day of July, 1962. The matter of costs is reserved pending disposition of plaintiff's motion to amend the findings of fact, conclusions of law and order for judgment filed herein.

MARION S. BOYD,
Judge.

Approved as to Form:

s/d JETER S. RAY,
JETER S. RAY, Regional Attorney,
s/d MARVIN M. TINCHER,
MARVIN M. TINCHER, Attorney,
Attorneys for Plaintiff,
LUCIUS BURCH, JR.,
LUCIUS E. BURCH., JR., by TM II,
TOM MITCHELL, JR.,
TOM MITCHELL, JR.,
Attorneys for Defendant.

A True Copy.

Attest:

W. LLOYD JOHNSON,
Clerk,
By V. LaFON,
D. C.

(Seal)

*Order Amending Order for Judgment*

In the
UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

| | |
|---|---|
| ARTHUR J. GOLDBERG, Secretary of Labor, United States Department of Labor, Plaintiff, vs. STEEPLETON GENERAL TIRE COMPANY, INC., AND A. E. STEEPLETON, Defendants. | Civil Action. No. 4344. |

**ORDER AMENDING ORDER FOR JUDGMENT.**

This cause came on to be heard on plaintiff's motion that the order for judgment herein be amended by striking from Paragraph VII on page 8 thereof the words "at the plaintiff's cost" and on written memorandum by attorneys for both parties, from all of which it appears to the Court that plaintiff's motion should be granted.

It is, therefore, Ordered, Adjudged and Decreed, that the order for judgment entered herein July 27, 1962, be and the same is hereby amended by striking the words "at the plaintiff's cost" from Paragraph VII on page 8 thereof.

This 2 day of August, 1962.

MARION S. BOYD,
Judge.

Approved as to Form:
TOM MITCHELL, JR.,
TOM MITCHELL, JR.,
Attorney for Defendants.

A True Copy.

Attest: W. LLOYD JOHNSON,
By J. W. ISELE, Clerk,
D. C.

(Seal)

*Notice of Appeal*

UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

STEEPLETON GENERAL TIRE COMPANY, INC., AND A. E. STEEPLETON,

Defendants.

Civil Action.
File No. 4344.

**NOTICE OF APPEAL.**

(Filed Sep. 27, 1962.)

Notice is hereby given that W. Willard Wirtz, Secretary of Labor, United States Department of Labor, Plaintiff, successor to Arthur J. Goldberg, original plaintiff herein, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final decree entered in this action on July 31, 1962.

/s/ JETER S. RAY,
JETER S. RAY,
/s/ MARVIN M. TINCHER,
MARVIN M. TINCHER,
United States Department of Labor,
Attorneys for Appellant.

A True Copy.

Attest:

W. LLOYD JOHNSON,
Clerk,

By J. W. ISELE,
D. C.

(Seal)

*Notice of Cross-Appeal as to Part of Judgment*

UNITED STATES DISTRICT COURT
For the Western District of Tennessee,
Western Division.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor, Plaintiff,
vs.
STEEPLETON GENERAL TIRE COMPANY, INC., AND A. E. STEEPLETON, Defendants.

Civil Action.
No. 4344.

**NOTICE OF CROSS-APPEAL AS TO PART OF THE JUDGMENT.**

Notice is hereby given that Steepleton General Tire Company, Inc., and A. E. Steepleton, defendants herein, hereby appeal to the United States Court of Appeals for the Sixth Circuit from so much of the final decree entered in this action on July 31, 1962 as effectively adjudicates, or makes a part of the record herein any finding, conclusion or adjudication, that the defendant, Steepleton General Tire Company, Inc., is engaged in commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act, all as amended by the order entered herein on August 2, 1962, granting the original plaintiff's motion pursuant in part to Rule 52 (b), Federal Rules of Civil Procedure, for such amendment.

LUCIUS E. BURCH, JR.,
LUCIUS E. BURCH, JR.,
By TM II
TOM MITCHELL, JR.,
TOM MITCHELL, JR.,
Attorneys for Cross-Appellants.

* * * * * * *

2* **DEPOSITION OF MR. A. E. STEEPLETON,**

being of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed as follows:

**Direct Examination,**

By Mr. Tencher:

Q. Will you please state your name and address?

A. A. E. Steepleton, S-t-e-e-p-l-e-t-o-n, 255 Ben Avon Way, Memphis, Tennessee.

3 Q. Mr. Steepleton, you are the defendant in this case of Goldberg versus Steepleton General Tire Company and A. E. Steepleton?

A. I am an employee of the company, yes. Just the company is the defendant, is that correct?

Q. No, you are named as a defendant, too, and my question simply is, are you the A. E. Steepleton who is named as a defendant in the case?

A. If I am named in it, I am; yes, I am president of the corporation.

Mr. Mitchell: The record reflects that he is president of the corporation.

Q. In addition to being president of the company, I take it, you are the active manager in directing affairs of the company?

A. Yes, sir.

Q. Are you also the principal owner of the company?

A. Yes.

Q. Is the Steepleton General Tire Company a franchised dealer in the Memphis area for General Tire & Rubber Company?

A. Yes.

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* Numbers appearing in outer edge of text indicate page numbers of original stenographic transcript of testimony.

*Deposition of Mr. A. E. Steepleton*

Q. For how long have you been the franchised dealer of General Tire & Rubber Company?

A. When I came here, I came here in 1944, and at
4 that time it was a company-owned operation and subsequently I bought the stock of the company and became owner of all the stock.

Q. Yes, sir.

A. It was some two years later, I think 1946 or '47. I have forgotten the date.

Q. Mr. Steepleton, is there a written contract or dealer agreement between you and General Tire & Rubber Company?

A. No.

Q. What territorial limits does your company have to operate in as a dealer for General?

A. Well, generally we operate, oh, within a radius of about 50 or 75 miles. We have no closely defined territory as such. In a case where there is another substantial General dealer within that particular radius, then we refrain from stepping on his toes.

Q. Yes, sir. Are parts of Arkansas and Mississippi included in the territory that you serve?

A. Yes.

Q. Now, as the franchised dealer for the company, I assume that you sell and distribute various products that are manufactured by General Tire & Rubber Company?

A. That's right. They manufacture many products, but ours is confined to tires and tubes.

Q. All right. Are any batteries included?

5 A. Some few batteries, yes; however, they don't manufacture batteries.

Q. And primarily the products that you deal in are the tires and tubes, is that right?

A. Yes.

Q. And does that include, I assume that in addition to

passenger tires and tubes and ordinary over-the-road truck tires and tubes, that you also from time to time deal in industrial type tires and tubes, earth moving equipment tires and tubes, and various products of that nature, too?

A. Well, we will sell anything that the company makes that somebody will buy.

Q. Yes, sir. Do you also sell recapped tires as well as new tires?

A. We do lots of recapping, and it is confined 99 percent to—at least 99 percent to the service of recapping other people's tires.

Q. I assume from that you mean on more or less a custom basis?

A. Custom basis, yes.

Q. And where is that recapping done?

A. At our place of business at 246 Monroe.

Q. Do you have a definite department of your business which you term the recapping department, or which would probably be termed a recapping department?

6 A. We call it a shop; it is a recapping shop.

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7 Q. Now, with reference to truck tires, do your employees remove the old tires from the customer's vehicle, and after they have been recapped then put them back on the vehicle?

A. In most cases they do.

Q. And in so doing, are you able to maintain the identity of the customer's tires so that he will get the same tire back after it has been recapped?

A. Yes, we have a continuous record of the serial 8 number of every tire that comes into our shop, and it is tagged in his name, and the same tire is r d.

Q. Yes. Could you give us an approximation of the

relative proportion between truck tires and passenger tires that you perform recapping on?

A. I don't keep any such record, but it is about 25 per cent. Are you speaking of units or dollar volume?

Q. I believe dollar volume would be preferable. Now, either way that you can approximate it will be satisfactory to me.

A. I can approximate it in dollar volume, that the passenger tire recapping is approximately 25 per cent of the total.

Q. And the other 75 per cent would be trucks or heavy equipment?

A. Right.

Q. Do you from time to time recap any passenger tires and put them in stock for sale?

A. We do a few, but there again dollar-wise it is infinitesimal, the amount of the total.

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12 Q. From what sources do you obtain your retread rubber that is used in recapping?

A. We buy most of our rubber from General.

Q. Now, in addition to their retread rubber—is that called camel-back?

A. That is a term that is quite often referred to, yes.

Q. In addition to the retread rubber, I assume you get your tires and your tubes and other products you sell from General Tire & Rubber Company?

A. Most of them.

Q. What places do you obtain those products from, Mr. Steepleton?

A. Well, General has a division warehouse here in Memphis, and all of our orders are placed at that source.

Q. Yes, sir.

A. And most of the tires and other commodities that we buy from General come out of their warehouse.

Q. But do you find that from time to time that when you place an order for something, you place the order with the district office here of General Tire Company. Do you find that the products you need are not in stock and they will be shipped to you from some other point?

A. Very seldom. Occasionally some item, we may order ten of an item and they have got nine; we get the
13 nine and they will back order the other one, and it will come in from some source, wherever the nearest warehouse might be.

Q. And sometimes that will be from their factory at Mayfield, Kentucky?

A. It could be from there. It could be from Waco, Texas, Kansas City, Atlanta, any warehouse point, but that is very rare that we have to get anything from out of town.

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15 Q. Do you sell to any fleet accounts in Arkansas and Mississippi?

A. Well, what is a fleet account?

Q. Well, I am going to ask you that in a few minutes, and this might be a good place to do it. Is the term "fleet account" one that is used in the tire business to such an extent that there is a recognized meaning for the term?

A. Well, I am sure the term is used. I still don't know the meaning of it.

Q. Do you use it in your business, the term "fleet account"?

A. Not particularly with any particular distinction, no.

Q. You do have a number of regular customers who operate fleets of motor vehicles, either trucks or cars or both, do you not?

A. Yes, we have customers that have all types of equipment.

Q. Would you say that the biggest portion of your business is done with customers who have five or more units of motor vehicles in operation?

A. Are you referring to our total business or to
16 our new merchandise business?

Q. Well, both is what I had in mind. Now, if there is a distinction or if you think to make the picture clear we should break it down, then I will be glad to do that.

A. Well, of course, we have no record of how many vehicles any customer has, but I would say, by and large, that since almost every family has at least two automobiles, maybe everybody, every customer we have could be considered operating a fleet.

Q. Well, now, Mr. Steepleton, I don't intend to make a distinction with reference to your customers who have one or more than one family car, but I would like to determine from your knowledge of your business whether or not the principal volume, dollar volume of your business, is from customers who operate fleets of commercial vehicles?

Mr. Mitchell: Well, I think the witness has indicated, Mr. Tencher, that he doesn't know the particular category or definition for the word "fleet" or "fleet account" which you previously used, and that he does not know how many vehicles are operated by particular customers at a particular time. Now, within the framework of that explanation and qualification, and if he can, I believe you are entitled to an answer to your last question.

17 Q. Would you go ahead now, Mr. Steepleton, and see if you can answer it?

A. Well, I would imagine that in dollar volume basis, including service, recapping, and all of our business, that our customers have several vehicles. I can't say how many.

Q. But, now, if I understand you correctly, you are saying that the biggest portion of these, more than 50

percent of your business dollar-wise, is obtained from customers who have multiple units of commercial vehicles, would that be correct?

A. I think that is substantially correct.

Q. Now, I will get back to my other question. Do you have any such customers in Arkansas and Mississippi that you regularly sell to?

A. We have a few customers in Arkansas and Mississippi, and I imagine that, by and large, they would fall into that category.

Q. You have salesmen who regularly travel in those two states as well as in Tennessee to solicit such business, do you not?

A. Well, not regularly. We do regularly but not on a daily basis. We have one man who makes one trip a week into Arkansas, and we have one that goes one day a week into Mississippi.

18 Q. Yes, sir. Are those your commercial salesmen?

A. Yes, sir, we generally term them commercial salesmen because they are by and large soliciting recapping business, and in our method of approach to this business, we find that the new tire business comes as a natural result of soliciting recapping business.

Q. Well, now, you call them commercial salesmen because they are soliciting recapping business. Is it correct that they are soliciting that business by and large from the operators of multiple units?

A. They are soliciting from anybody that needs tires or needs recapping.

Q. But your commercial salesmen, I take it, do not call from house to house as a general proposition to call on the individuals to solicit recapping business?

A. No.

Q. They are calling on business establishments?

A. Business establishments, yes.

* * * * * * *

21 Q. With whom in the General Tire Company organization do you transact business in day to day activities, Mr. Steepleton?

22 A. More directly with our local division manager, Mr. Brunskill.

Q. Now, to what extent do you deal directly with Mr. Brunskill in your business?

A. Well, merely on the basis of placing orders through his salesmen, sometimes through his salesmen, and most often by direct telephone call to his office, but so far as our business dealings with Brunskill direct, he is a source of counsel and business management and advisory capacity so far as the company's policies are concerned.

Q. Is there someone else in the district office here that you deal with directly, such as the territory manager?

A. He has a territory manager who is assigned to our account.

Q. All right, who is that man?

A. His name is Meeks.

Q. Does Mr. Meeks call at your establishment from time to time in the capacity of salesman or adviser or any other capacity?

A. Yes.

Q. And what would be his function in such contacts?

A. Well, his function is to carry out his soliciting business, I suppose, number one, to encourage us to help carry out all the company policies such as advertising and merchandising methods and so forth.

23 Q. Does he from time to time work with your salesmen in calling on some of your customers or your potential customers?

A. Yes.

Q. Now, would you explain the procedure by which your company obtains merchandise from General Tire & Rubber Company, whether by written order, telephone order, or how?

A. Well, it is 99 percent by telephone, I would say, or it must be 100 percent by telephone. I don't remember of ever—no, let me change that a little bit. When this man calls on us, if at the particular time he happens to be in there and we want to make him feel good by giving him an order, we give him an order verbally, and he carries out the function of getting it placed and delivered, but in most instances we order by telephone.

Q. Who are the persons in your organization who are authorized to place those orders by telephone?

A. Well, myself, my son, Mrs. Lauderdale, and if none of us are available and some emergency item was needed, I suppose anybody concerned has the authority to go ahead and perform that function.

Q. And do those orders have to be telephoned to anyone in particular at the district office?

A. No.

Q. When an order for merchandise is placed with the General Tire Company, Mr. Steepleton, would you explain the terms by which the order is transmitted to you, the merchandise transmitted to you, whether it be on consignment or whether you are billed, and if so, the terms?

24

A. We are billed immediately or as soon as the billing process can be completed, and the terms are 2 percent cash discount and 10th prox. on everything except truck tires, and I believe that is 60 days.

Q. Sixty days net?

A. No. I think we still get a cash discount.

Q. Is any substantial amount of your merchandise delivered to you by General Tire Company on consignment?

A. None of it.

Q. None. Does your company submit any regular profit and loss statement or balance sheet to General Tire Company?

A. We are required to periodically send in a statement to the Credit Department.

Q. Does that go to the district office here?

A. I am not sure.

Q. As I understand it, the Credit Department of General Tire Company which handles your account and bills you is at Dallas, Texas, is that correct?

A. The Credit Department is at Dallas. The billing, I think, is all essentially done on IBM machines in Akron.

Q. And when you say periodically, you submit a
25 report of some kind, what is the report? Do you have a name for it?

A. We get out a monthly operating statement.

Q. Mr. Zaveson assigned as an exhibit to his deposition some sheets which were marked 5-A, 5-B, and 5-C. Do you know whether your monthly operating statement is on any such form as that, Mr. Steepleton?

A. Yes, we use the same form. This is a form that is used by General Tire & Rubber Company stores, divisions and stores that they have financial interest in, and we have adopted the same accounting procedure and the same form mainly for comparison reasons, because we arrive at these comparative percentages of all operating phases of the business by conforming to their same accounting procedure.

Q. I see. Now, I assume that your company keeps a copy of these operating statements that you submit to General Tire Company?

A. Yes.

* * * * * * *

26 Q. How many employees does your company have at present?

A. I am not sure just right to the exact amount, but on the last day of December it was an even 50. No, the last day of November—excuse me—at the end of our fiscal year.

Q. Is that generally about the number that you operate with?

A. That is about it.

Q. And as I understand it, you have two buildings there at your location on Monroe Street?

A. Right.

Q. But you operate as just a single establishment, is that correct?

A. Yes.

* * * * * * *

28 Q. (By Mr. Tencher) Mr. Steepleton, if I understand you correctly, you testified a few minutes ago that you do not supply new merchandise to any registered sub-dealers of General Tire Company, is that correct?

A. That is correct.

Q. Do you have any General Tire Company dealers or people who regularly sell General Tire Company products that you do supply?

A. No. Are you speaking of right at this particular moment or at some time in the past?

Q. Well, I had in mind at the present time, but if you do not have any now and have had in the recent past, I would like to get that information.

A. We have had from time to time some marketing agreements with some of the car dealers, but we have at the present time no sub-dealers or anyone operating as such on any permanent arrangement. We occasionally —some dealer will want to buy a General tire or a set of particular tires because he has a customer that has requested them.

29 Q. I notice among the customers that you had in 1960 one Austin-Bliss General Tire Company. Do you know who that is or the nature of his business?

A. Austin-Bliss? Where?

Q. I don't have the address.

A. There is some—I have a recollection of it as a General Tire distributor somewhere in the United States, but I can't recall the name of the town, but do you have the amount of the sale there?

Q. No, I don't. These are simply names taken from your records.

A. Just at this minute in trying to recollect who that particular person is, I believe it is a General Tire dealer that we sold a piece of equipment to somewhere and shipped it, disposal of fixed assets or something of that nature.

Q. Do you have any recollection with reference to business that you did with Fagor General Tire Service Company?

A. Fagor is a General Tire dealer in Monroe, Louisiana, and it is possible that we probably recapped some tires for him.

Q. Do you have any recollection concerning a Wilson General Tire Service?

A. There is a Wilson that is a General Tire dealer in Milwaukee. I don't recall any business dealings with him unless we might have sold him some used equipment.

Q. Do you still from time to time sell tires, either new tires or recapped tires, to used car dealers?

A. Occasionally, very little.

Q. And to garages in your territory?

A. Very little.

Q. But some?

A. Some.

Q. Yes, sir.

A. Our price is generally higher than our competitors, so we are unable to secure that type of business.

Q. When you do make sales of tires to garages and used car dealers, you are aware, are you not, that those are sales for resale purposes?

A. In most cases, yes, where they supply exemption numbers, certificates, and our records I think will indicate those instances.

Q. Do you prepare a daily recap sheet in connection with your sales in the operation of your business?

A. We do by product.

Q. Does that sheet in any way reflect the type of sale, whether it is one for resale purposes or sale for use of customers on vehicles?

A. No.

* * * * * * *

32 Q. In connection with the new products that you sell, does General Tire & Rubber Company provide you with a price list to use in making those sales?

A. Yes, they provide us a suggested list price.

Q. Is that termed in the business a code price list?

A. No. In recent years, I think in the last two
33 years there has been a code put on the price list which is a key to arrive at cost.

Q. What is the designation of price lists that you use in making sales?

A. Well, actually in the tire business, a price list doesn't mean anything because nobody knows the price of a tire from day to day, and it is just a figure that is used as the starting point trying to arrive at some kind of a selling point.

Q. But it is used, I take it, as a starting point or in some other way; basically the price list is a part of your pricing system, is it not?

A. Yes.

Q. And is there any particular designation for this price list as a resale list, price list or some other designation? I just wonder what you call it.

A. A price list.

Q. Now, you say that in recent years a code was put

on it to determine cost. Would you explain what the code is and how it is used?

A. Well, the code is an astronomical figure that is put on there that is higher than the list price, and by deducting certain discounts from that code figure, we arrive at our cost, merely because the list prices do not have the same relationship to cost all the way through, but
34 the code price does.

Q. Now, does the code price which you have, I suppose in the form of a number of sheets of paper, show you what prices you are paying for any particular merchandise that you might want to order from General Tire Company?

A. State that again.

Mr. Tencher: Let's have the reporter read it back.

(The reporter read the last question aloud.)

A. Well, in code prices, they are printed not on a number of sheets of paper, but it is printed on the suggested list price and opposite that list price number.

Q. And is this the document, printed price list, that you and your salesmen use in making sales to your customers?

A. Which?

Q. The one you have described.

A. The price list?

Q. Yes, sir.

A. Yes.

Q. And you use that same price then, that same price list, to determine a beginning for bargaining with your customer over the price you will charge him and also as a basis of determining what your cost is, is that correct?

A. That is correct.

Q. Does that same price list give you a guide for
35 pricing the recapping you do for customers?

A. No.

Q. Do you have a separate printed price list for that purpose?

A. Yes, we make up our own price list.

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36 Q. From such a price list as you stated that you could let us have, could you explain how the wholesale price is determined from the code price expressed there or the code symbol?

A. Well, we have no definite prices at any given time for any particular class of people or buyer.

Q. When you make a sale to a dealer, for example,
37 is there a percentage of discount that you allow the dealer from the retail price that is listed there in the price list?

A. Yes.

Q. What would be the percentage of discount that you would allow a dealer?

A. Well, that depends on the commodity. As I stated before, there is a very inconsistent relationship to list and cost at variance with the different sizes and types of tires, and that discount by no means can be consistent.

Q. Well, does it follow any sort of pattern? For example, on passenger tires which you would sell to a dealer, would you normally allow him, say, 40 percent discount?

A. Well, that would be a fair figure to shoot at.

Q. Would that be a typical discount to a dealer of passenger tires?

A. Well, it would be from our list price. In some instances we make up our own list price and don't follow the list that is prepared by General Tire.

Q. Yes, sir. Have you made up—— (interrupted)

A. ——because of these inconsistencies.

Q. Have you made up a list price for both truck tires and passenger tires to be used in your business?

A. We have on the passenger tires.

Q. On the passenger tires only?

38 A. We have made some changes in the code price on the truck tires.

Q. And in making those changes, have you simply penciled them in on the price list furnished you by General, or have you made up any?

A. We have had them printed.

Q. You have had them printed? Did you have copies of those that were in use in 1960?

A. I am not sure.

Q. Now, during the time that you would have had this price list that you made up for use in your business with reference to passenger tires, when you put a list price there, would that be the price at which you would sell passenger tires to a general member of the public who would come in and want to buy a set of tires for his car?

A. Well, that is the price we would like to get, but it has never happened.

Q. Even the prices that you made up have not been used in making sales?

A. No, the price lists are made up for the purpose of having plenty of leeway in the trading.

Q. As a part of promotion, I suppose, or bargaining on an individual basis?

A. Correct.

39 Q. Now, what would be the normal or typical deviation from the list price that you would make to a person who simply wanted one tire or four tires for his automobile?

A. Well, usually in most cases there is some salvageable used merchandise involved in the deal, and we try to trade on what its resale value is.

Q. Aside from taking in used tires in trade, and I take it that your salesmen would have an idea how much

actual value that tire would have, aside from giving the customer either the actual value to you of his used merchandise, how much more adjustment or reduction from that list price would you normally make in this sale?

A. There again that would be determined by the product, because in some of these the mark-up is very inconsistent. Some cases the mark-up is probably 100 percent, and on the same price list and on a different kind of a tire and different size and a different type, it may only be 25 or 30 percent, so there again trying to establish discount percentages is not feasible because it just is not practical to do so.

Q. Yes, sir. Well, take one of your standard products. I have seen them advertised, but I don't recall offhand the tradename, but it is the dual or the twin tread.

A. Dual 90.

Q. Or your premium tire—what was the term?

40 A. Dual 90.

Q. Dual 90. Now, how much reduction from your list price on the dual 90 would you be willing to make to the ordinary individual purchaser?

A. Well, there are circumstances which alter it, and sometimes you have got an adjustment situation involved, but we try to sell the tire at two 10's off. We sometimes go three 10's off, and we sometimes go 40 percent off.

Q. To an individual, even though he is not a fleet owner or anyone that you would expect to help you get business from a fleet owner?

A. That's right.

Q. Now, how much reduction—perhaps before we go into that, we better come down to one of your utility type tires that would be used, for example, by a taxicab company or some company that has a number of ten or twenty automobiles used by its salesmen in the business, the type of tire they might use. Do they normally buy the dual 90 or one that is not a premium tire?

A. Normally they would not buy a premium tire.

Q. Take the type frequently referred to as first line tires. Would that be the type of tire that General Foods Company, for example, would use on its fleet of salesmen's automobiles?

A. It probably would be, yes, sir.

41 Q. All right, now, how much reduction from your list price would you be willing to make to the average individual customer for one or a set of four of the first line tires?

A. Do you mean based on our current list price or something that was in existence two years ago?

Q. Well, I prefer to make it for 1960. What was then your current selling price on that particular tire if you can recall it?

Mr. Mitchell: For the record you are talking about—I did not follow the question perhaps. You are talking about a sale to an individual automobile owner?

Mr. Tencher: Yes.

Mr. Mitchell: Of a product you have classified as a first line tire?

Mr. Tencher: Yes.

Mr. Mitchell: The question then is what reduction or what discount would be allowed on that kind of transaction in 1960?

Mr. Tencher: Yes.

A. Well, I don't recall right offhand what our percentage of mark-up was at that time, but we would attempt to sell the tire on the basis of trying to gross somewhere in the neighborhood of 25 to 35 percent gross profit.

42 Q. All right, now, if you were making a sale of a number of tires of that first line tire in the same period of time to a company that has a fleet of automobiles used in its business, what would be the reduction that you would make?

A. We would still try to maintain the same gross profit, maybe the minimum of it, because in all cases tires are a commodity that we have to service and live with from the time we put them on a man's wheels until they are worn out, and, therefore, it isn't the type of merchandise that you can expect to dump over here and forget it. Being a retail service establishment, that is our obligation to follow the life of that commodity.

Q. Now, you have used the term "retail service establishment" in your answer, and I assume from that that you are simply characterizing your own appraisal of the type of business that you are carrying on, is that right?

A. That is correct.

Q. Could yon name for us one of your customers that you had in 1960 that you sold passenger tires to on a fleet account basis? I mean by that either he had ten or more passenger cars used in the business?

A. Well, most of our commercial type of accounts, of course, are truck operators and insofar as passenger car tires go or are involved, I can't name one that we sold any particular quantity of tires to. Usually the
43 passenger tires that are bought by a commercial type of account are more or less on the individual, personal type of basis. A certain individual owns or drives a company car, and he puts a set of tires on his car and bills it to the company.

Q. For example, United Taxi Company is one of your customers?

A. United Taxi would be the only one, I guess, that we have sold any quantity of passenger tires to.

Q. What would be the typical discount that you would give or did give to United Taxi Company?

A. I am not sure. That is handled by our retail tire department, but I think about 30 percent, perhaps 33⅓. I am not sure.

Q. Would that be reflected in your sales records or invoices or any sort of record?

A. Not as such. It would reflect a net price, but we don't show discounts. I don't believe they do. One salesman may write a ticket up occasionally showing a discount, but for the most part, only a net price is shown.

Q. I take it from that it would be necessary then to check the individual sales tickets and from them determine the product that was sold and the price at which it was sold, and compare that price with the list price in order to determine how much discount was allowed?

A. That is substantially true, yes.

44 Q. Now, in the tire trade and in your business, is the term "national accounts" in general use, Mr. Steepleton?

A. Yes, it is used by the factory.

Q. And do you in your business supply products to some of these national accounts of General Tire Company?

A. We make deliveries for General. Our national account arrangements are made between the two companies, and we act as the delivering agent.

Q. I suppose General supplies you with a list of the people in this particular area that have such a national account arrangement with them?

A. Yes. When they make a national account arrangement with a company, why, we are advised and asked to cooperate in servicing them.

Q. And as I understand it, the billing for whatever products you supply to the particular account is done directly by the General Tire Company, the home office?

A. Yes.

Q. Could you name the national accounts that you have been supplying products to in 1960 here in the Memphis area?

A. I can name a few. I couldn't begin to recall all of

them. There are some we might have been doing business with in 1959 or took care of in 1959 that we didn't in 1960, and vice versa, but I think that Wilson Packing Company would be one of the accounts that we serviced, probably Kroger during that year——

Q. Would General Foods be one?

A. And General Foods. Have you got some more on the list there?

Q. Yes. International Harvester?

A. International Harvester, correct, the Federal Government.

Q. Colonial Baking Company?

A. I don't believe we were doing business with Colonial Baking Company during that period.

Q. Are you at present?

A. We did some in 1961.

Q. How about Continental Baking Company?

A. But it was all recapping, all the business we did for them. Probably Continental, yes, during 1960. Stewart's, a subsidiary of Continental.

Q. Texas Gas Transmission Company?

A. I don't believe we—I am not sure about them.

Q. How about Arrow Equipment Company?

A. Arrow Equipment Company, manufacturing.

Q. The products you supplied to that company would be for use on new equipment such as boat trailers?

A. They manufacture trailers, and that is original equipment business, yes.

Q. How about International Harvester, were they getting General Tire products for use on original equipment here?

A. Yes.

Q. And how about Tri-State Mack?

A. Tri-State Mack.

Q. That would be for use on original equipment?

A. That would be actually—anything that went to Tri-State Mack would be only a delivery to them and eventually covered by a Mack Truck Company purchase order.

Q. For use on original equipment?

A. To General Tire for original equipment.

Q. Yes, sir. Now, let's take Wilson Packing Company as an example for one of your national accounts. Would you just explain the procedure whereby you receive an order from Wilson and how it is billed and so forth?

A. The requisition is written by the Wilson Packing Company in Memphis, and it is sent to their Chicago office. Their Chicago office in turn writes the purchase order and forwards it to General Tire & Rubber Company district office here, and then we are advised of this order and asked to deliver the merchandise.

Q. And where do you make the delivery of the merchandise?

A. We make the delivery to their plant at 1400 Warford.

Q. Is a part of that delivery the mounting of the
47 tires?

A. Well, it isn't a requirement. It is quite a bit; in most cases they have a worn tire that needs to come off for recapping, and we solicit that recapping business and offer to mount this new tire in lieu of getting the tire for recapping.

Q. And if you mount it, do you also balance the wheels for the Wilson Company?

A. Not necessarily, not unless we are asked to, and that is a separate service charge if we do.

Q. Now, is Wilson Packing Company one of the largest of the national accounts that you service? I mean by that, do you supply more tires to them than you do to the average national account in your territory?

A. Well, I don't—I am not absolutely sure about that. From time to time they have seen fit to take their busi-

ness away from General and buy somebody else's tires, so there are times that we are making deliveries and there are times that we are not.

Q. How about the Kroger Company? Is that a pretty consistent customer of General that you supply tires to?

A. It is fairly consistent, but there again the same conditions apply.

Q. Are their orders handled similarly to Wilson Company?

A. No. I believe their garage superintendent has
48 the authority to place the order directly on a local basis.

Q. If the Kroger garage superintendent does place the order, how is the order written up and delivered to Kroger?

A. Well, I think in most cases we never see the actual purchase order. He will write out a purchase order, and he will call us or give us the order verbally to our salesmen, and he will give us the order number, and we place it on our national account delivery receipt that he signs.

Q. And does your service man or one of the employees from your company take the tires to Kroger and mount them on their equipment over there?

A. In some cases we mount them, and in some cases we just put them in his stock.

Q. Has that been a fairly regular part of your business during 1960?

A. Well, it is a very small amount. I wouldn't suppose we delivered them over 20 tires during the year.

Q. In addition to the new tires that you have delivered Kroger, you also do recapping for Kroger, I believe?

A. Yes.

Q. Now, do you bill the Kroger Company for the recapping you do for them?

A. Yes. That is our own business, yes. That is business

we solicit from Kroger just like we would from you
49 or Mr. Mitchell or anybody else that owned a truck.

Q. And you set the price on that?

A. We set the prices.

Q. So with reference to the new products that you deliver to Kroger, do you know what the price is which they are paying for the tire?

A. No, sir.

Q. I believe you said that part of the time you do mount the tires that you deliver to Kroger here on that national account, the new tires?

A. Yes.

Q. And when you mount them, do you balance the wheels?

A. No.

Q. Is there any other service performed in connection with the mounting of the new tires other than just putting them on?

A. We put air in them.

Q. Get them ready to go?

A. Get them ready to go.

Q. Now, when you deliver those new tires, are they the type that take tubes, too, the Kroger account, tires and tubes?

A. I am not sure whether they are using tubeless tires or not, but I don't believe they are.

Q. In any event, if there are tires and tubes, you
50 deliver both and mount them in such a way as to make them ready for operation?

A. We do on the—in cases where we are getting—we render some extra service in order to get the man's recapping business, exactly like the fellow in the filling station wipes your windshield and he supposes you will come back and buy gasoline from him, so in order to get this man's recapping and other service business, we do some

little niceties for him in order to influence him to buy products from us.

Q. Now, the new tires and tubes that you deliver to Kroger, I take it, are from your regular stock of new merchandise?

A. If we have them in stock, usually for convenience we deliver from our stock, and they are either replaced or we are given credit by General Tire & Rubber Company.

Q. Now, the type of tires that Kroger has used during 1960, I take it, are the usual types of truck tires that you handle and sell every day?

A. Yes, I would say so, yes.

Q. And would that be true generally with respect to the other national accounts, that they are all using products which you normally keep in stock?

A. In most cases, yes.

Q. And where you fill such an order for a national account, it is your general practice to take your stock, whatever you have in stock, if it is there, and
51 supply the product they have ordered?

A. Yes, because we save a lot of time and expense by doing that rather than making a trip to North Memphis and checking the merchandise up in the General Tire warehouse.

Q. And you don't keep on hand any segregated stock out of which you supply the products to these national accounts, do you?

A. No, not unless it should be an unusual item that is normally not purchased by the general public.

Q. Do you have any national accounts that fall in that category?

A. At this particular time, no.

Q. Or in 1960 that you recall?

A. I don't think so.

Q. And do any of these national accounts order passenger tires as well as truck tires?

A. Yes.

Q. Where they order passenger tires, is your delivery procedure essentially the same as with the truck tires such as you have described?

A. Yes, except in most cases they come after them.

Q. And they would be mounted and balanced there at your place of business, I suppose?

A. Yes, if they are willing to pay for wheel bal-
52 ancing or other services, why, we perform those extra services.

Q. If there are other services performed such as balancing the wheels, does this national account pay you directly for that extra service?

A. Yes.

Q. With reference to the tires and tubes that you deliver to a national account, I assume that those are products that you already have paid General Tire Company for or have already been billed for, whether you have paid the account or not? Is that the usual course of business?

A. Yes, in most—yes, I think it would be in every condition. In other words, every tire that we received.

Q. It is your merchandise?

A. They are billed to us.

Q. And it is your merchandise to deliver either to a national account or one of your customers as you see fit?

A. As a matter of record in order to receive our service commission, why, I think that is necessary.

Q. Now, what is this commission that you receive on the delivery you make to national accounts, Mr. Steepleton?

A. What is it? You mean dollar-wise?

Q. Yes, or percentage-wise during 1960.

A. Percentage-wise, you mean how much the total gross amount of commission?

53 Q. No, just the rate of commission.

A. Oh, the rate of commission?

Q. Yes, sir. How are you paid for making these deliveries to the national accounts?

A. Well, we are paid on a sliding scale type of commission. That is, for instance, when we receive two and a half percent of a dealer price list—a dealer cost level, let's put it that way—on manufacturers' deliveries, and we are paid five percent on governmental deliveries, that is GSO; and ten percent on the other types of national accounts.

Q. Commercial type of national accounts?

A. Yes.

Q. Do you have any sort of written contract with General Tire & Rubber Company that prescribes the procedure by which you are expected to supply products to the national accounts?

A. We have no written contract. It is merely a mutual agreement to keep our relationship in good standing with our supplier to carry out the servicing of their direct customers.

Q. After you delivered, for example, a set of truck tires to the Kroger Company, what do you do with reference to General Tire Company in order to get paid for that transaction?

A. General Tire has a national account delivery receipt type of invoice which we fill out and show that we made delivery to such and such national account on their

54 purchase order number so-and-so, and we get some evidence of it by getting someone in that organization to sign that invoice, and we send it in to Chicago for us to receive our credit or replacement.

Q. Does General Tire Company then furnish you with

any sort of document or credit memorandum or anything else showing how much they allowed you for the transaction?

A. We are issued a credit memorandum for the cost of the merchandise plus delivery commission.

Q. Whatever the applicable percentage is?

A. Yes.

Q. And that percentage would be based on your cost of the particular merchandise you supplied?

A. Yes, and we also have to supply a reference number showing when or on what invoice number we acquired the merchandise in the beginning.

Q. Is the price as shown by that invoice the price at which you are credited on your account with the value of the merchandise you delivered to the national account?

A. The price that they credit us with is the price we paid for it originally.

Q. Even though at the particular time you make the delivery, it might have been costing you some other price?

A. Yes. We have to furnish the stock movement
55 number and they refer that back to their billing to arrive at the price they originally charged us for it, and they credit us back with the same amount.

Q. In sending delivery receipts such as you have described to General Tire Company, do you at the same time send any invoice or ticket showing the actual delivery of the merchandise?

A. Yes.

Q. That would be a copy of your sales ticket, I suppose?

A. A copy of our sales ticket is made out to General Tire & Rubber Company charging the merchandise back to them or getting it in some form showing that it was returned, and we get a credit for it.

Q. When you make out that invoice billing the General Tire & Rubber Company, do you specify on that the price of these particular items?

A. You mean the price we pay for it?

Q. Yes.

A. Yes.

Q. Do you also put on there the commission that you expect to be paid for the particular transaction?

A. Yes.

Q. In other words, you make out a sales ticket or invoice then which reflects the amount of credit which you expect to be given for having delivered the
56 particular merchandise to the national account?

A. Yes.

Q. After you have completed that invoice and sent it to General Tire, if you wanted an early replacement of the merchandise that you have delivered to the national account, do you prepare or do you make a separate order to the district manager or to someone else telling him you need some more of that particular item for your stock?

A. Yes.

Q. Where do you send the credit transaction, your delivery receipt, to? Does that go to the district office?

A. It goes to the district office.

Q. But that in itself would not be an order for some more merchandise?

A. No.

(Off-the-record discussion.)

Q. (By Mr. Tencher) With reference to the recapping which you do for Kroger, for Wilson, and others of the national accounts, are you free to set the price of their recapping without regard to any prices that General Tire Company might negotiate with these national accounts?

A. Yes.

Q. How does that price compare with the price which you would charge for recapping that you do on a
57 similar size truck tire for some truck operator who has got only one or two trucks?

A. Well, it depends an awful lot on some national accounts we have. We handle the service for them, the mounting, the dismounting, the same as we do on an individual, and in that case we charge the same prices.

Q. Is the price you charge then determined by the service or extra work that would be involved?

A. Yes.

Q. And is it without regard to the number of vehicles that the particular customer operates?

A. Yes.

Q. Is that termed a commercial price on recapping?

A. Well, we have our own commercial prices, yes, that we charge everybody, every account that we make without an exception, that we handle the servicing, we do their mounting, dismounting, the mating and matching, the airing, the road servicing, all the things that are necessary to perform in the function of the truck tires. Now, we have some cases where for reasons of their own that they would rather perform their own servicing, or perhaps because they have a union arrangement, they won't permit us to handle service, why, we make a differential in the price on a pick-up and delivery basis.

58 Q. Do you have very many such commercial customers where you have this price differential and do not perform the service that you have described?

A. Very, very few, not over—in 1960 I don't suppose we had over two that I can recall, and currently we don't have over four or five right now.

Q. What approximately would be the price differential there, Mr. Steepleton?

A. Well, it could be anywhere from 10 to 15 percent, depending on the service that they demanded and the number of hours that it took your people to stay there and perform extra functions.

Q. Perhaps I didn't understand you, but I understood

that you have a commercial price for recapping, which is the same regardless of the number of vehicles your customer has, provided you also render this extra service of mounting or mating and matching and airing, is that correct or not?

A. That is correct.

Q. All right. Then for those few customers where you do not provide the extra service, you will reduce the recapping cost by 10 or 15 percent from your commercial price list, is that correct?

A. Well, we use—it could be—I am trying to think. We use a suggested factory list in those instances, and
59 their relationship to our list varies considerably from one type tire to another.

Q. But in general, you think it would run from somewhere in the neighborhood of 10 to 15 percent lower?

A. That is the difference in the cost of the performing of the services.

Q. In other words, you do then figure into your cost of supplying the recapping service plus the cost of the extra service of switching and mating and matching of the tires and airing the tires, all of that you compute in setting the price for your large commercial accounts?

A. Yes.

Q. Would you be able to give us the names of several of your larger accounts? I mean those which have 10 or more vehicles for which you regularly do the recapping plus the extra service?

A. Well, I don't know how many vehicles that any of them have, but I am sure it is a matter of record. You already know of some of our larger accounts, and I think Southwestern Transportation Company would probably be our largest.

Q. There is no question but what they have 40 or 50 vehicles at least? I don't know how many.

A. Well——

Q. No question but what Kroger has well in excess of 10 vehicles?

60 A. Yes. Well, however, we get a very little, very small percentage of Kroger business. Their business is divided among five or six different companies sometimes.

Q. It wouldn't be any question but what Wilson Packing Company operates well in excess of 10 vehicles?

A. I am sure they do.

Q. And Stewart's?

A. Yes, sir.

Q. And Continental Baking Company?

A. Yes, sir.

Q. And Road Builders Equipment Company?

A. They wouldn't operate any. I say any—they have a few vehicles of their own that haul heavy equipment, but they are equipment dealers.

Q. Yes, sir. Then such business as you do for them would be in the nature of recapping of tires to be used, to be put on used equipment which they would resell?

A. Some would, and some would go on their own equipment.

Q. Similarly, for Tri-State Mack the bulk of your recapping would be on tires to be put on used equipment for resale?

A. Well, no. During 1960 Tri-State Mack was operating a leasing company, and some of the tires were run on that equipment and some went on used equipment.

Q. For resale?

A. Yes.

61 Q. And I take it that there would be no question but what DeSoto Ready-Mix Company operates more than 10 vehicles?

A. I don't believe they do. I think they have less than that, considerably less than that.

Q. Are they here in Memphis or Shelby County?

A. Yes, they are somewhere south of Whitehaven, right at the state line.

Q. I suppose you would know that Delta Oxygen Company has more than 10 vehicles, would you not?

A. No, I am not sure, no, sir.

Q. You think it might be less than 10?

A. I think it might be less.

Q. How about John A. Denie's & Sons Company?

A. I am sure they have more than that.

Q. And how about Ray D. Carter?

A. In 1960 Ray Carter—I don't know; he just started in business, and I don't know how many vehicles he has.

Q. He had a hauling business plus a leasing business, I believe, didn't he?

A. No, Carter Leasing Company is a different company.

Q. Is it? Do you know whether Mid-South Aggregates has more than 10 vehicles?

A. I don't know. A lot of these companies operate leased equipment, and it also depends on what you
62 call a vehicle. There are tractors and there are trailers, and you only license one of them, and I don't know how to tell how many vehicles a person has, and there are some companies who own only trailers and all the pulling equipment is leased from individuals or from one company.

Q. At any rate, Mid-South Aggregates provided you with a pretty substantial amount of business, and had a fleet of vehicles of some number that would be more than four or five?

A. Well, they run a construction business, and they had some dump trucks and earth moving equipment, but I don't know how many.

Q. And how about Littlejohn Taxi Company?

A. They have several taxis; I don't know how many.

Q. I suppose United Taxi Company has 10 or more?

A. I think so. We keep no record of how many vehicles any one customer has.

Q. If you have a customer for whom you do recapping service who has only one or two vehicles, say, an individual with his car, or an individual truck owner-operator, as a part of your recapping business do you perform this regular service of airing his tires and mating and matching his tires and so on at no extra charge?

A. To what extent we can, yes, sir.

Q. But your larger recapping customers, you have
63 employees who go around to the place of business to check their tires and air them and mate them and match them and so on, do you not?

A. We do. We also in our regular tire, passenger tire business, have our customers come in and have their tires rotated and checked periodically. Every customer is sent a notice at, I think either three or four months, putting him on notice that his tires have probably gone another three or four thousand miles and that he should come in and have them rotated and inspected, and we perform this service consistently for all type of customers.

Q. Without charge?

A. Without charge.

Q. Now, in performing the rotating and matching service in the customer's place of business, you have a published price for the service unless it is under this arrangement where it is provided free?

A. We have a list for performing services for persons who are not our customers as such. Quite often a person will call us to advise us he has a flat tire or to perform some service that has never bought a tire from us. He is in trouble; it is an emergency, and, therefore, we make a charge for it.

64 Q. Now, in connection with the Southwestern Transportation Company, I believe you keep an employee down at the place of business every day, do you not?

A. Yes. Those trucks come in and out of there at all times of the day and night, and in order to handle the volume of business that we get from there, it takes well over a half-day. We have a man that goes down there in the morning, and I believe he gets there at seven o'clock and he performs whatever jobs are to be handled there up until the middle of the morning, and then he will get away from there for a couple or three hours and then go back, and another group of equipment has probably come in in the late afternoon.

Q. Does the service at Southwestern Transportation Company include removing flats and repairing punctures at no extra charge?

A. I believe that they do their own tube repairing down there. I am not sure; I am sure if we bring them in and repair them, we charge them for it, but I believe they do their own repairing.

Q. What would be the extra service amount to or what would it involve at Southwestern?

A. Well, the number or amount of equipment they operate, there is enough turnover of equipment in there from day to day that we are pulling tires off for recapping every day.

65 Q. In addition to that, you are checking the air pressure and you are rotating the tires to get maximum wear, and you are mating tires so that on dual wheels the tires will both carry their proper share of the load and things of that type, is that involved?

A. Yes, sir.

Q. Do you have any sort of mileage guarantee on your recapped tires for any of your customers?

A. We have a standard guarantee to everybody that

we will guarantee them for, in cases where they keep mileage records, we will guarantee them **on a mill a mile.**

Q. On any and all your customers?

A. In most cases on over-the-highway operations, and there again the guarantee must fluctuate according to the type of service, the tires and all, and that is a standard guarantee we give to everyone.

Q. Is that guarantee given in writing to your various customers?

A. No.

Q. It is just understood?

A. It is just an understood thing.

Q. Who is the employee that regularly services tires at Southwestern Transportation Company for you?

A. Do you mean the salesman?

Q. No, the service man that changes tires.

66 A. Well, that changes from time to time. We may have one man down there for a week and change, or he may be there three months and change, but that is not a consistent thing.

Q. Is the Southwestern Transportation Company the only one of your customers for whom you provide this service on a daily basis?

A. I would say Southwestern is the only customer we have that we get sufficient amount of business from to warrant daily service, and we probably have others that we are called to perform some type of service nearly every day.

Q. By "some of this type of service", that is free service?

A. Well, there isn't anything free. We are getting paid for it because we get a sufficient amount of business at a profitable price to justify the service.

Q. Yes, sir.

A. The service this customer gets in relation to "Joe Doakes" with one truck is all relative.

Q. But by free, I meant at no extra charge for sending a man to the place of business and changing the tires and matching and mating of tires and checking the air pressures and so forth. Are there other customers that you do that for without extra charge on a daily basis?

A. We go to John A. Denie's Ready-Mix Plant daily, and we go to Weymouth Construction Company.

Q. Any others you recall?

67 A. I don't know; I can't recall any others right now that we are currently doing that for, but we do it for anybody where the business and the necessity warrants it. We would do it for you.

Q. If my volume of recapping was such to make it worthwhile?

A. That's right.

Q. Now, many of the other customers for whom you do recapping, I assume, you provide this checking service and changing of tires and so on at no extra charge, less frequently than daily, and I have in mind some of your customers for whom you do it every week?

A. Yes, sir, and I think the same thing would apply that if you drove your automobile enough that you had to buy gasoline every day, you would get your windshield wiped off every day and your floor swept out every day and your oil checked, but if you drove your car only enough where you had to give us your car once a week, why, you would probably get that service once a week.

Q. Now, you are giving me an example though of a service that is performed at the place of business where I buy the gas, but here my questions relate to the service as performed at the customer's place of business, rotating the tires and mating and matching the tires and so on, taking them off and bringing them to your shop

68 and taking them back and mounting them, which is not done at your place of business. Now, is that

the type of service that you do on a weekly basis for many of your customers?

A. Well, our purpose in going to anybody's place of business to do anything is to get tires to recap, and we certainly are not in the business of checking air pressures and fixing flats and for any other reason other than to get tire business, and some people, some size accounts require this service daily; some require it semi-weekly, some require it weekly; some require it monthly, and probably in the case of the man with one truck, we may not see him over every three or four months.

Q. And in that type of situation when you do see him, he would normally come to your place of business rather than you sending a man out to his place of business?

A. Not necessarily, no, because in the first place we don't have the room to service trucks at our place. We have a terribly congested situation, and while occasionally the trucks drive in there, we prefer to service it away from our place.

Q. If he is an operator of one truck though, would you charge him for a service call though if you go out to match his tires or pull one off?

A. Not if he was operating our tires. If he had
69 our tires and our recaps, it is our obligation to make them perform.

Q. Well, that would be in a situation where I assume that the tire had given away before it should have. Suppose he has a set of your recapped tires which in the normal course of his operation is simply worn slick again and are ready to be recapped a second time. Do you wait until he calls you to go out?

A. Not necessarily. Our salesmen are probably in contact with him. They have a card file on him, and they know substantially how many miles they operate in a month, and they have got a pretty good idea of when

this man is going to be ready for tires again, barring any unforeseen accident in between time, so they stay in contact with him and they pretty well know when he is in the market for some additional service or merchandise.

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**Direct Examination,**

By Mr. Teucher (Continued):

Q. Mr. Steepleton, I would like a little more clarification with reference to the daily or weekly services, as the case may be, that you provide to various of your commercial accounts. I believe you stated earlier that even though no separate charge is made for these services, that they are not free services, and would you elaborate on that just a little bit?

A. Well, now, let's look at it. We look at it this way. You see, a lot of these trucks—in other words, you are trying to draw a comparison between what we do for Southwestern and what we do for somebody else.

Q. Yes.

A. Now, the very nature of their business makes or causes a differential there. Those trucks that belong to those people come into their terminal at all hours of the day and night. More particularly we find a certain group of them there in the morning, and then they will be loaded and go out, and another group will be there in the afternoon, so the nature of their business requires constant surveillance plus the fact that there are a lot of trucks involved, and there are other types of commercial accounts whose trucks are constantly in operation throughout the business day so that the only time we can see them is on Saturday, so as a result in order to get to those trucks and pull tires off for recapping, we have to go see those particular trucks on Saturdays

because we can find a group of them together and
71 we can more readily do a good job on mating and matching tires by virtue of having more than one truck to work with at one time.

Q. Would Mid-South Aggregates be a fair example of one that you perform that service on a weekly basis?

A. Mid-South Aggregates and one of their other companies are strictly on a C. O. D. basis. They owe us about $15,000 and we will never get a dime out of it, and we are currently not doing business with them.

Q. Could you name one that you do handle on a weekly basis?

A. That we go by and see if their tires are available for recapping on a weekly basis, yes, I think that you named one a while ago.

Q. DeSoto Ready-Mix?

A. DeSoto Ready-Mix would probably be one, yes.

Q. In addition to checking to see whether the tires need to be pulled and recapped, you do match and mate tires of all various vehicles?

A. On that particular day if there wasn't anything that needed it—we very seldom go into the function of matching and mating tires until we are ready to mount some new tires or some recapped tires, and that is part of the proper application of the truck tire, is to be sure that it is running beside one that is of comparable size and tread design.

72 Q. And in doing that, I suppose that you are rendering a valuable service to the customer to prolong the life of his tires and to reduce uneven wear and things of that nature?

A. That is our intention, yes, sir.

Q. And would it be correct to say that in providing that service, either on a daily basis for Weymouth Construction Company and John A. Denie's, for example,

on a weekly basis for DeSoto Ready-Mix and other of your customers, that it cost you a substantial amount to provide the service?

A. Well, the service is always relative to the amount of business involved, whether it be new tires or whether it be recapping.

Q. Yes, sir, and in any event, the checking of the air pressures and the mounting of the tires, the matching and mating of tires there at the customer's establishment, is a service that you do not provide for an average, individual customer?

A. We will provide it for anybody that requires it as a part of their business.

Q. At the customer's place of business?

A. At the customer's place of business.

Q. Well, can you give any examples of individuals for whom you provide this matching and mating service of tires, and if so how?

73 A. We have quite a number of individual milk haulers that haul milk into the dairies. Now, while we don't go to that man's home at Collierville or some other town or community that he might live in to perform this service, we go out to the dairy while he is unloading and perform this service.

Q. Does he call you to come and do that?

A. Sometimes he calls us, and sometimes our salesman has contacted him, and he meets him out there and finds things to be done, and we go out and do it. There are a number of individual truck operators who have in the past leased to automobile carriers. They own one truck. We will go to usually Commercial Carriers or Dealers Transport or wherever this man is basing his operations, and perform these services for him.

Q. Would that be on a call basis rather than going periodically by prior arrangement?

A. Well, I wouldn't necessarily say so, because our salesman is down there contacting those people, but I suppose if he had a flat tire out here with a load on it and he is in trouble, then he is calling us.

Q. But otherwise you wouldn't know—you could see that fellow at a particular time or each week, on the same day of each week to perform that service?

A. That is my salesman's obligation to follow that customer and determine what service he needs when.

74 Q. Then the service call or your service truck to perform the matching of tires or the removal of a tire would be at the instance of one of your salesmen rather than being dispatched on a schedule basis?

A. Well, that is true with the others, too.

Q. Would John A. Denie's, for example?

A. Our salesman is responsible for what happens there. He is the person responsible for establishing the requirements to properly service this customer.

Q. And this particular customer, the requirement is to go each day, isn't it?

A. That is correct.

Q. And your service truck does go each day without special call or being sent specially by the salesman, isn't that right?

A. Well, he goes each day. Now, if you want to get technical about it, somebody told him to go.

Q. But there is a distinction, is there not, between the arrangement whereby your service man goes to John A. Denie's and the arrangement by which a service man goes to the Transport Dealers' establishment?

A. Basically I can see no distinction, and again the service rendered is relative to the amount and type of business involved.

75 Q. In one instance it is on a regular basis and in the other instance it is on an unregular or individual and specially set schedule?

A. It is regular because the requirements cause it to be regular.

Q. Now, I believe that you have many of your fleet account customers who in addition to the recapping service you provide, buy their new tires and tubes from you, is that correct?

A. Some of them do.

Q. Now, do you have your commercial salesmen to call on those accounts with reference to selling them the new tires and tubes? Is that part of the salesmen's function?

A. That is part of their function.

Q. And is the salesman authorized in advance to arrange the terms of the sale, for example, the code less 40 percent or code less 50 percent, or whatever the price might be at that particular time?

A. Well, they are authorized usually within certain limitations to quote whatever price is necessary to get the business, and that thing fluctuates from day to day, so I never know the prices myself really.

Q. Is it the normal thing for the salesman to check with you with reference to each major sale that he would make, say, to one of your commercial accounts?

76 A. Well, they occasionally advise with me on what we are up against, a competitive situation that hasn't previously existed to our knowledge, and I am advised of it, and we will confer on what we can do in order to take this business and still make a little profit on it.

Q. And the price that you would agree upon with that customer for his fleet of several vehicles would be normally a lower price than you would charge for an operator of, say, one truck?

A. Well, not necessarily, because of competitive conditions, the lowest available prices to fleets the size of Gordons Transports are being extended by our competitors to one truck operator.

Q. On occasion, is that right?

A. Yes, sir.

Q. But as a general rule, wouldn't it be true to say that your fleet accounts buy at lower prices than individual truck owner-operators buy?

A. It depends. Quite often prices are made not in relation to the size, but in relation to how the man is going to pay. Some people who are able to pay their bill on the 10th of next month might be extended a little bit better deal than the guy that wants to take six months paying for it.

Q. But when all those factors—— (interrupted)

77 A. But in either case, they are a retail sale because they are being sold to a consumer, and the price has nothing to do with it.

Q. And that is your interpretation of retail sales?

A. Right.

Q. Without regard to that, where the terms of the sale are similar with reference to the time for payment, and where you have a customer with a fleet of 10 or more vehicles, isn't it the normal thing for that customer to get a lower price, to pay a lower price for your new products than other customers buying the same size and type of tire, but he is operating only one vehicle?

A. Well, it isn't my theory of business to operate in that way. Certainly it is true that competitive retail prices force us to make some differential, not because he has more trucks, but because he buys more tires. Maybe he is willing and able to pay for them immediately, we may have some distress inventory here that we want to move, and we might have a very logical reason to cut the prices a little bit to get him to take an extra few tires.

Q. But whatever the reason is, wouldn't it be fair and correct to say that as a normal part of your business, the fleet operator gets a lower price per tire than the individual truck operator?

78 A. Well, there again I don't know what you would call a fleet, because I can't see any difference between why a man should have a different price if he owns nine trucks, and over here he has got ten.

Q. Well, let's take the situation—— (interrupted)

A. We will say in our business the size doesn't regulate the price. The marketing conditions regulate the price.

Q. Well, whatever regulates the price, let's take a situation of an owner of ten or more vehicles as distinguished from an owner-operator of one vehicle. Isn't it the normal thing for the operator of the fleet of ten or more to buy his tires from you at a lower unit price than the operator of the one vehicle?

A. Well, it is normal that we are going to try to get more.

Q. Well, would you go ahead and answer the question and tell me whether as a normal thing it doesn't occur that way?

A. Well, I can't say that it actually does, because we have many customers who have more trucks than you are quoting as a fleet number.

Q. Yes, sir.

A. ——who are paying more for their tires than in some instances the man that has one or two trucks.

Q. Is that a normal situation?

A. I don't know that it is normal. There again I
79 am trying to convey to you that the marketing conditions from day to day and from customer to customer fluctuate and change by the hour, by the day, and by the week.

Q. I still don't believe we have an answer to the question as posed, namely, that at any given time on any particular day, whether the normal situation is for the fleet operator who has not less than ten vehicles and any number that you may select larger than that, whether

on a given day that person, that fleet operator, would normally buy his tires at a lower unit price than the operator of a single vehicle?

Mr. Mitchell: I think the record reflects that same question some five or six times.

Mr. Tencher: I concede that.

Mr. Mitchell: And since his additional explanation—he gave an explanation first as to why he found it impossible to give an empirical or definitive answer on that, and he has elaborated on his inability four or five times, seeking for him to explain why an answer cannot be given, that is, in express terms to the question as you have phrased it, but I think after this one further attempt, I believe we should move on to something else.

Mr. Tencher: The question certainly has been asked. I have attempted to express it in different words
80 in order that I may get across to the witness the information that I am seeking, but so far I don't believe the question has been answered, or to my mind satisfactory explanation given for not being able to answer it.

Mr. Mitchell: I believe in essence the witness has stated that if you are talking about a single isolated sale of a tire or tires for one vehicle to the owner of one vehicle as compared with the single isolated sale of a tire or tires to the owner of several vehicles, and it has been repeatedly explained why there is no normal selling price in such a transaction in Mr. Steepleton's experience in the tire business.

Mr. Tencher: Let's see if we can get it in this way, Mr. Steepleton?

Q. Would it be correct to say that in the normal course of your business, you do from time to time and frequently make sales to fleet operators of more than ten vehicles for commercial purposes?

A. Well, I am sure we do. I have no record of the number of vehicles they have, but I am sure that some we have fall in that category.

Q. You know that many of your customers fall in that category?

A. Yes, sir.

81 Q. You also are aware that as a regular and recurring part of your business, you make sales of tires of the same size and quality to individual truck operators, don't you?

A. Yes.

Q. Now, my question is, assuming—and I think this would be a fair assumption that on any particular given day, you will have sales transactions involving both types of customers that we have just described, would that be true?

A. Yes.

Q. Now, isn't the nature of your business such that you could give a fair appraisal of what would be the normal manner in which those two types of transactions would be handled?

A. Well, in either instance our salesman would try to get the highest price that he could.

Q. Yes, sir.

A. But in either instance also, he would probably sell either one of them at the lowest price.

Q. There would be a certain area within which the salesman would be free to adjust and bargain as to price?

A. That is correct, because that salesman is paid a percentage of the gross profits.

Q. Yes, sir.

A. ——and the higher price he can collect, the more

82 commission he makes, so every time he gives away ten percent, he gives away part of his commission.

Q. Is he paid a percentage of the gross profits on each transaction, each sale?

A. Yes, sir.

Q. All right, and within certain limitations he will adjust the prices for either of those two customers?

A. Yes, sir.

Q. And he makes sales of both types from day to day regularly as a part of his business?

A. Yes, sir.

Q. Now, are you familiar enough with the way your salesmen are making those sales that you could give a fair appraisal and tell us whether as a normal proposition the sale to the fleet owner with ten or more vehicles would be at a lower unit price than the sale to the individual truck operator?

A. Well, I don't think I can.

Q. Why not?

A. You are talking about in units, in dollars, in number of customers, or what is your basis for the question?

Q. Simply the unit price of the same type of tire that he might sell at any given day to the two classes of your customers that we have defined.

A. I think I have already answered that question.

83 Q. No, sir.

A. That he is permitted, or he knows his cost. He is paid on a gross profit basis. He is going to try to get the highest price he can from either category, and that if he gives away any of our gross profit, he gives away his commission.

Q. You have explained that.

A. So he is permitted to take the deal at any price within a certain scope that he has a mind to, in order to secure the business.

Q. Yes, sir.

A. ——and the price that he quotes is almost entirely regulated by what our competitor is doing, and our com-

petitor is selling the one truck operator at the same price as the guy with 100 trucks.

Q. You have explained that.

A. Even though their company policy may say no, they are finding ways to get around it and are doing it.

Q. But what you have not answered is what the normal or based on an average, the sales your salesmen make to the fleet operator would be at a lower unit price than the sale that he made to the individual truck operator?

A. I don't have those figures.

Q. Wouldn't you be able to tell from your over-all knowledge of how those sales are made, how they compare?

A. Well, we are talking about today, we are talk-
84 ing about yesterday, we are talking about 1960?

Q. Any of those times.

A. I know that in the most recent months, the individual truck operator has been buying right down to the bottom deal in many, many instances.

Mr. Mitchell: I believe that is as clear and elaborate an answer as he can give. I don't think we need to tarry any longer with that proposition. I think the record now reflects a frank statement by the witness that he is not able to answer, does not have the figures available and that with respect to his general recollection that the current experience is that they are buying, that is, these two types of consumers are buying at the same prices, and that if that is normalcy, your question requests normalcy, that is what it is.

Mr. Tencher: I can't accept counsel's interpretation of the answer, but I believe that with what the witness has said, I am ready to pass on to something else.

Q. (By Mr. Tencher) Do you from time to time, Mr. Steepleton, mail out to your larger commission customers a quotation of prices at which you can supply their needs for the immediate future?

A. No.

Q. Have you not in recent months, for example, put
85 in writing the basis on which you could sell tires, say, to Weymouth Construction Company or to John A. Denie's Sons Company?

A. Not that I know of. The only thing in that category could be that perhaps in some of our advertising in the newspaper on passenger car tires, our salesmen have maybe sent out a pre-advertising—pre-sale notice that we are going to run a sale on such-and-such tire at such-and-such a price, but I have no knowledge of any such thing as you are referring to.

Q. Are your salesmen authorized to quote prices or offers in writing over your signature?

A. Well, they are not authorized to do it. They might do it. If I have made any written quotations in the last —over how long a period did you say?

Q. I didn't specify, but I have in mind going back to some time in 1960.

A. Well, it is possible that we might have been requested to submit a bid that was current for that particular day or month. I am sure we have.

Q. All right, but other than that, you have not made it a practice, I take it, of soliciting business in writing by making a blanket offer?

A. No, sir.

Q. Does General Tire Company territorial manager,
86 that is Mr. Meeks, I believe you said?

A. Meeks, M-e-e-k-s.

Q. Does he ever help you or your salesmen in contacting a fleet account and trying to make sales in the business of tires and other products?

A. His function is to assist me or our company in training salesmen or to help them in making a sale and rendering product knowledge and quite often engineering knowledge, as the case may be.

Q. Now, in this competitive situation you have described previously, your salesmen occasionally find either your own customers being offered tires at a price that you can't meet, or potential customers that you would like to sell that have been quoted prices from a competitor that you under the normal situation cannot meet. Do you at such time arrange to have your territory manager help to work out an arrangement with that customer so that you can meet the price you have to?

A. Well, we, my salesmen and myself and all the field organization of the General Tire & Rubber Company are certainly alert to the marketing conditions and what competitors are doing, and there again, to show the instability of the tire pricing structure, we will call on the factory representatives to see if we can get a
87 price to meet a competitive situation.

Q. And is that sometimes done, that you will get a special price for a particular customer in order that you can get the business?

A. Yes.

Q. And when that is done, is it necessary that some agreement or arrangement be put in writing as between you and General Tire Company with reference to that particular customer?

A. No.

Q. Do you have any such customer at present to whom you sell on a fleet account basis where the price that he is paying you had to be worked out with General Tire Company?

A. Well—— (interrupted).

Mr. Mitchell: Let me ask for a clarification of that question. Does it import the idea that there will be a continuing availability of tires at some such price to a particular customer?

Mr. Tencher: That is what my understanding is.

Mr. Mitchell: On established accounts receivable now?

Mr. Teneher: No, I have in mind a continuing situation.

Mr. Mitchell: Within that frame of reference and my understanding of it, go ahead with the answer.

88 A. I don't recall what the marketing situation was in 1960 in the period we are talking about. I am sure some of those conditions existed, but I can't recall right now exactly who they were or what the conditions were.

Q. One I have in mind—— (interrupted)

A. But they have been existing for off and on.

Q. Yes, sir.

A. (Continuing) For a number of years, as you probably no doubt have found out.

Q. Ray Carter was one in that category, I believe.

A. The marketing situation in the tire business has been such for the past two or three years that competitive pressure has forced the retail price down below what we were normally supposed to pay for tires.

Q. And, for example—— (interrupted)

A. So at some periods of time during the past year, we might have been selling a lot of people at some prices below what we will say it is supposed to be.

Q. In fact, in some instances has the price been below what you normally are billed for the same item?

A. Yes, sir.

Q. Was Ray Carter in that category for the same period of time?

A. I don't recall exactly the name of the accounts,

89 and I think it is irrelevant.

Q. Well, I would perhaps agree with you except I wanted to use that one for illustration purposes. If it was true, it was carried on your records as a category 4, and I believe you explained that that meant he had a special 10 percent additional discount on something that had been arranged with the company?

A. It is possible that that was true.

Q. And whether or not that particular one was involved and so classified, is that the situation you were describing that you have had various accounts that continued over a period of time with a special price that would either be below your price or below the price to which you could sell to the customer and make a profit?

A. Well, I wouldn't say that the—I can't define the length of time because these marketing situations in the tire business fluctuate. We get a period of very soft prices, and all of the rubber companies are participating in a soft market situation. All at once our company will say "No more deals", and you are back operating within your regular buying price, and we try to uphold that situation until the dam breaks again, so this thing fluctuates up and down.

Q. When there is such an arrangement made with
90 General Tire Company to permit you to sell at a rate lower than you normally sell, how are you protected so that you can still make a profit on that transaction?

A. We advise them that the competitive quotation is such-and-such, and we tell them who the competitor is that is quoting the price, and then they bill us the merchandise at 10 percent below that figure.

Q. Now, do you have to furnish General Tire with some written evidence that this competitive situation exists?

A. We don't furnish it, no.

Q. But you work out your arrangements through the district manager, I presume?

A. That is correct. The district manager and all of the district managers nationally are usually aware of the marketing situations that exist throughout the nation, and when the same thing crops up in Memphis that is going on in Detroit, they know beyond a shadow of a

doubt that we are not—that we are giving them the true information on that and usually go along with it within certain limits.

Q. Now, in what way does General Tire distinguish the particular products you are selling to this account so that you will be billed at 10 percent less than your usual billing for the products going to that account, but not the products that go to regular accounts?

A. By order, by a specific order.

91 Q. Then do you supply these special accounts on special order, or do you supply them from your regular stock and then advise the General Tire Company of how many tires of the particular kind that you supply to that customer?

A. That could be either way. In any case we will either pick them up and make a direct delivery, or we will replace our inventory.

Q. In what way would that transaction be handled differently from the transaction involving the delivery to a national account?

A. Well, in 1960 I think they were handling it in a similar basis to a national account, the accounting procedure, but currently they are billing straight off the invoice.

Q. In 1960 then would it have been your practice to report the transaction on a national account delivery receipt form?

A. No, oh no. We would set it up on a claim account.

Q. On a claim account?

A. The fact of the matter is, the commission is not the same thing, but similar, but it is on a claim account rather than a delivery receipt.

Q. But the difference would be that you would bill the customer in that instance, would you not?

A. That's right. The difference is that that customer

is our customer. He is our retail customer. The national account is General Tire's customer.

92 Q. Whether or not he is retail or wholesale or some other basis, you are the one who bills them and you are the one who collects from the customer?

A. Right.

Q. Now, your records indicate that you do a considerable amount of business selling to the City of Memphis. Is that still true?

A. We do some business with the City of Memphis. I think that—I don't know what our total dollar volume is, but about $15,000 a year is strictly service charge.

Q. And some of it is new tires?

A. Some of it is new tires and some is recapping.

Q. Is any part of that business obtained on a competitive bid basis?

A. All of it is, that is, all of the new tire and recapping is on a bid basis.

Q. Now, in your business do you treat these sales to the City of Memphis on a bid basis as wholesale sales or as retail sales?

A. Retail sales. They are consumed by the City of Memphis and, therefore, are retail sales.

Q. In your classification?

A. Yes, sir.

93 Q. How does the price that you charge to the City of Memphis compare, for example, with the price that you charge to the United Taxi Company?

A. Well, I think since it is a bid proposition, I imagine that it is lower.

Q. The price to the City of Memphis would be lower?

A. Yes, sir.

Q. Now, does the City also buy truck tires from you?

A. Yes, sir.

Q. And those truck tires that are sold on a bid basis,

would the price to the City of Memphis be less than the price, for example, to John A. Denie's Company for comparable tires?

A. Well, for anyone the normal would be that it is lower. I imagine that sometimes during the extreme pressure of competitive situations, that the reverse might be true.

Q. Yes, sir.

A. I have no—I can't recall the exact figures.

Q. All right, sir. Could you say whether the sales to the City are just for the purpose of delivery or does it involve mounting and balancing of wheels and so on?

A. Delivery only, with the exception of some cases they request in the bid that tires be mounted, but normally it is a delivery proposition.

Q. And you spoke of some $15,000 a year being servicing and recapping business.

94 A. Let me qualify that. Probably I said $15,000 of it would be service, and I may be a little bit high, but usually somewhere in the neighborhood of between $12,000 and $15,000, that is service.

Q. All right, now, what does that involve?

A. That involves the service trucks and men that we have doing service work for the Public Works Department.

Q. Would you elaborate a little bit on that? What sort of service work is that?

A. Well, they buy all of their tires on a pick-up and delivery bid basis, not only from us, but from many other companies, and those tires are delivered over there, and our service men do all of the mounting and the dismounting and the flat repairing and all the necessary tire maintenance work.

Q. Is that normally done at the City Garage?

A. Normally most of it is done there or at various places where they have equipment stationed.

Q. How many service trucks are you operating? Let's say how many trucks did you operate in 1960?

A. Eleven, I think.

Q. Are those service trucks equipped with a two-way radio?

A. Most of them are, yes. I think all of them but one.

Q. I assume that is still the situation?

95 A. I believe we have 12 now.

Q. Your records indicate that you occasionally have sold tires in 1960 to the United States Post Office Department. Could you state whether or not that was under a national account basis or some other basis that you made those sales?

A. It would be a national account basis on the new tires, and if we did any recapping or service work, that was strictly a local basis.

Q. If you did any such recapping, did you set the price, or was it done at a price which was set by the Federal Government?

A. We set the price.

Q. You also have sold tires to the State of Tennessee, I believe?

A. Yes.

Q. Could you state whether those were sold on a bid basis or some other basis?

A. Well, the rubber companies all print a suggested state price list wherein the various states will buy tires at a certain price. Now, some states accept that, and some of those don't and put out separate bids.

Q. Does the State of Tennessee accept it?

A. The State of Tennessee accepts the accepted state price list. The City of Memphis doesn't.

96 Q. In other words, when you make a sale to the State of Tennessee, I assume you make it on this state list price basis?

A. Yes.

Q. Do the various counties that you sell to also buy on that state list price?

A. Well, they are entitled to and also tax free. In other words, they don't pay excise taxes under your Government body. The Federal Government pays excise taxes; the states, counties, cities and any other tax supported organizations are exempt of Federal excise tax and the sales tax. Some counties accept the state price. Some counties don't and ask for bids. Others where we are rendering them service, they pay higher than the state price and pay our regular commercial prices.

Q. And that would include Fayette County, Tipton County, and Weakley County among your customers?

A. And Gibson.

Q. And Fayette?

A. I am not sure about Fayette. I don't know; there are two or three of them that pay a little higher prices because we send our truck instead of them having to pay freight to a remote city up here, why, we deliver the tires and in most instances mount them for them,

97 and they pay a higher price than state prices. Our arrangement with them on the recapping is the same as any other customer, any other individual.

Q. Does the Dyer County buy on the state list?

A. I think so.

Q. Landerdale County?

A. I think so.

Q. And Mississippi County in Arkansas?

A. Mississippi County doesn't buy any new tires from us. That is all recapping, and in most of these counties, Gibson, Fayette, Weakley, all the rest of them, the most of it, the high percentage of dollar volume that Mr. Micklish shows in his audit is recapping and service function.

Q. I assume that since you were testifying from memory that if your records show sales of General truck tires, for example, to Mississippi County, even though that might be reflected and the most of the business is recapping, that that would indicate a sale of a new tire?

A. Yes.

Q. And Quitman County in Mississippi is another one for which you do both recapping and selling of new tires?

A. Yes.

Q. Do you know whether they buy their new tires on the state list price?

A. I believe that all the Mississippi counties buy
98 on a bid basis; I am not sure.

Q. How did you receive the bids and the invitations to bid?

A. They have an invitation to bid annually, and the bid amounts to merely a formality that we file a price list with them, and I presume the other bidders do, too, and then they make their request or requisition from whomever they feel like they want to give the business to.

Q. Do your commercial salesmen call on the appropriate officers in these various counties to get the business?

A. Yes, sir.

Q. Is that essentially the way in which the Memphis bidding is done?

A. No, the Memphis bidding is by mail.

Q. All right, sir.

A. No solicitation.

Q. And by and large, you would say then the state list prices are lower than the commercial prices at which you sell to various fleet accounts as a general proposition?

A. Well, they are supposed to be as a general proposition. Currently, I am not quite sure, but I believe they are either equal or lower.

Q. And how would those prices compare, for example,

with the prices at which you sell to a service station or a dealer for resale?

99 A. Well, they are lower, because in every instance we have to recover our tax. We have bought this tire, we have got $9.00, $10.00 or $15.00 excise tax in it, so in order to recover our excise tax, we have to report this sale with the tax exemption certificate, and we are paid a delivery commission again of seven and one-half percent of the state price.

Q. Is that seven and a half percent commission in addition to the price that you collect from the county or the particular governmental unit?

A. It is not in addition, because the state price is below our normal buying price, so every tire that we deliver to a state agency or governmental agency and we reclaim the Federal excise tax to be refunded, we have to show a stock movement number of a tire, similar tire that was purchased at our normal buying price, and then we are reimbursed by a credit or the difference between our normal buying price and the state price, plus a delivery commission.

Q. Yes, sir. and all of that difference is paid to you or credited to you by General Tire Company?

A. Correct.

Q. Now, with reference to these extra services that you provide for some few counties, Fayette County, Gibson County and Weakley County, what do they involve Mr. Steepleton?

A. Delivery of the merchandise some 50 or 75 miles

100 or whatever the distance is involved, usually mounting the tires, and generally servicing like we would any other commercial account.

Q. Balancing, is that involved sometimes if it is a passenger tire?

A. Well, we wouldn't be in a position to balance tires

away from here, because our balancing machine is lagged down to a concrete floor.

Q. Now, what I am trying to get at is do you in arriving at the price that you charge to particular counties for the products you sell them, do you take into account the state price list that you would charge any other county and add to that the cost of providing this extra service?

A. I would say that that is the way we arrive at it, yes.

Q. In substance then, you would be selling to them at a comparable price at which you would sell to another county, but adding the cost of providing the extra service?

A. The cost of providing that service, yes.

Q. Now, I don't think I have covered this specifically, but could you know how the price of passenger tires, new passenger tires, to United Taxi Company compares with the price of similar tires that you would charge a dealer or a used car dealer?

101 A. Well, I don't know exactly, but I think we are charging a little higher price. We are selling them a special taxi tire that is not available to my knowledge from other competitors, and we are able to collect a pretty good price.

Q. Is there a standard discount from the list price for these taxi tires that you normally apply 35 percent or three 10's, or something like that?

A. Well, I think we only have one account that we are selling these tires to.

Q. That is United Taxi?

A. That is United Taxi, and am not exactly sure what the discount is, but I think it is somewhere in the neighborhood of three 10's, 30 percent, or 33⅓ percent off, somewhere in that category.

Q. How many commercial salesmen have you had in 1960 at any one time?

A. I think seven at the most during that period.

Q. Now, is there another category of salesmen that you have working out in the field at the same time?

A. I have five men who will stay in the store part of the time, not all of the time, generally, and soliciting passenger tire business.

Q. They do occasionally go out to solicit business?

102 A. Oh, yes.

Q. What category or classification do you have for those, those salesmen?

A. What do you mean?

Q. You termed these other commercial salesmen because they are calling on your commercial accounts. Now, the five who specialize in selling passenger tires, do you have a name or classification for them?

A. We generally refer to them as passenger tire salesmen; however, they do in some instances—I mean they confine their activities mostly to soliciting passenger tire business. Now, they do get into some type of accounts which you would call a commercial account who may have ten cars and two trucks and would get some truck business, but their assignment is principally the solicitation of passenger tire business from all categories, and my passenger tire sales manager is the one that handles the taxi account that you refer to.

Q. Have these salesmen been termed retail salesmen?

A. It is possible to call them retail salesmen or passenger car salesmen. We call them all retail salesmen.

(Off-the-record discussion.)

Mr. Tencher: I believe that is all the questions I have.

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**TRANSCRIPT OF TESTIMONY AND PROCEEDINGS.**

4 The Court: All right, is the rule called for, gentlemen?

Mr. Burch: If Your Honor please, we would like the rule.

We have one witness that we would like to have at the counsel table. He is an attorney.

I believe Mr. Tincher has a witness, Mr. Micklish, who is an attorney, and he wishes to stay at the counsel table. We have no objection at all. Mr. Micklish is an examiner and proposes to be here.

I would like to present to the Court at this time Mr. Ray Shaeffer and Mr. Walter deBruin, both attorneys, Mr. Shaeffer is with General Tire Company, Mr. deBruin with Goodyear Tire Company.

(Proceedings in re another matter.)

Mr. Tincher: If I might comment just a moment, Your Honor, on Mr. Burch's calling for the rule. We have no objection, of course, to their keeping a representative of the company at the counsel table. And he correctly stated that we would like to have Mr. Micklish, the Wage-Hour investigator, at the counsel table.

In addition, the Government has three witnesses who we believe will be in position to give some expert testimony with reference to one of the issues in the case, and we would like those witnesses to be present and hear the testimony.

5 The Court: Well, is there objection to the expert witnesses remaining in the courtroom?

Mr. Burch: Yes, Your Honor. I would like to know just a little bit about who they are, what they are going to talk about, before I can tell Mr. Tincher more about it.

Mr. Tincher: We have Dr. John R. Moore, of the University of Tennessee Department of Economics, Dr.

Robert C. Brooks from Vanderbilt University Department of Economics, and Miss Sarah Ginsberg, who is an economist with the Wage-Hour Division in Washington.

Mr. Burch: I have no objection to any of those, Your Honor.

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7 **PLAINTIFF'S PROOF.**

Thereupon the Plaintiff, in support of the allegations of the complaint, introduced evidence, as follows:

**A. E. STEEPLETON,**

the first witness, having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. Will you state your name, please, sir?

A. A. E. Steepleton.

8 Q. And what is your relation, Mr. Steepleton, to the defendant, Steepleton General Tire Company, Inc.

A. I am President.

Q. Do you own the stock of that company?

A. I own about ninety-five percent of it.

Q. All right, sir. Where is the business located, Mr. Steepleton?

A. 246 Monroe in Memphis.

Q. You have two buildings that are operated there by the business?

A. Yes, there is one main building that we conduct most of our business in, and then there is one across the street which is principally a warehouse.

Q. Yes, sir. What is the relationship of your company to General Tire and Rubber Company?

A. We are one of their dealers, independent dealers.

Q. And what territory does your company serve?

A. We serve principally—most of our business is in Shelby County, but we do some business in the adjacent area, probably a seventy-five mile area or radius of the city.

Q. That includes some counties in Mississippi and Arkansas?

A. Yes, sir.

* * * * * * *

16 Q. And is it true that your service trucks with their drivers make calls outside of Tennessee to repair tires and to remove tires and to put tires on
17 your customers' equipment?

A. That is true. But may I add this, that there is a substantial portion of the merchandise billed to the out-of-state customers that comes into our place and we fix it up there and we apply the tires on his car, or he drives a pick-up truck in and picks them up and takes them back to Arkansas himself.

Q. But in the normal course of business, your employees do vulcanize, re-cap or repair tires which necessarily are delivered to points outside Tennessee?

A. Yes, sir.

Q. In addition to that, Mr. Steepleton, do your service men go into the terminals of various trucking companies and contractors and work on their equipment to remove tires, to repair flats, and to install recapped tires?

A. Yes, sir.

Q. And many of those customers are operating their vehicles across state lines into other states than Tennessee, are they not?

A. I am sure that some of them are.

Q. In fact, would not that be a very considerable part of their business?

A. Some of them, yes.

Q. Yes, such as Southwestern Transportation or
18 Gordon Transport and the Kroger Company, customers of that kind?

A. I have no idea how much of their business is interstate. Some of them is.

• • • • • • • •

19 The Court: We are confining this investigation to the single year 1960. It seems to me there was some stipulation along the way somewhere that that would be the case.

Mr. Tincher: That is correct, your Honor, with reference to the coverage issue and the exemption issue.

The Court: As being typical of this defendant's operation?

Mr. Tincher: Yes, sir.

The Court: All right.

• • • • • • • •

20 Q. In 1960, where did you place your order for tires that you obtained from General Tire & Rubber Company?

A. With their division office on Huron Street.

Q. Here in the City of Memphis?

A. Yes, sir.

Q. And from where did you receive delivery of merchandise you got from General Tire?

A. From their warehouse.

Q. Would that be all of it or part?

A. Occasionally when they were out of an item, or had to be back ordered, the item would be shipped from some other warehouse.

Q And that did occur from time to time in 1960?

A. I am sure it did. I don't receive the merchandise. I don't know where it comes from, now.

Q. But anyway, you are aware that some of it is received from out-of-state shipments?

A. I am sure it is, some small portion of it.

* * * * * * *

21 **Cross-Examination,**

By Mr. Burch:

Q. Mr. Steepleton, how long have you been in the tire business?

A. Since 1938; twenty-four years.

Q. Is it or not a fairly competitive business?

22 A. I did not understand.

Q. Is it or not a fairly competitive business?

A. It is extremely so.

Q. In order to stay in it, do you have to equip yourself with some knowledge as to how it is conducted and run, and what its practices are?

A. Yes, I imagine so, you certainly——

Q. Let's don't imagine. I want you to be sure about it.

A. I believe you would have to grow up in it, because I don't believe a beginner today could exist in it, it is so highly competitive.

Q. Has it gotten more competitive since the war than it was before?

A. Tremendously so in the last four years.

Q. Now, before I ask you about the general practices with which you are familiar from these long years of experience, I want to ask you a little bit about your individual business.

Now, you have been questioned about sales that have been made to out-of-state customers, and undeniably you do make such sales, do you not?

A. Right.

Q. Now, will you state, would billings to out-of-state

customers be directly indicative of the volume of
23 sales to out-of-state customers, or not?

A. The billing?

Q. The billing, yes.

A. Well, I don't know of any other way you could determine——

Q. Well, you gave Mr. Tincher that answer, and since I think it is wrong, I want to ask you about it.

Say I am a planter at Horn Lake, Mississippi, and I actually come in there and buy four tires in your place of business, and you install them on my automobile, and the billing goes to me at the Horn Lake business, but where was the sale or delivery made?

A. I understand what you are getting at, now, Mr. Burch. The point I brought up a while ago, the sale and the delivery quite often is made at our place of business in the State of Tennessee.

Q. Well, from——

A. (Continuing) And——

Q. From your general——

A. (Continuing) The billing, of course, shows up as to an out-of-state customer.

Q. Exactly. From your general knowledge of your business, of whatever the volume in sales develops to be that is billed to customers outside of the state, what
24 approximate percentage of those billings which refer to transactions where the actual sale and delivery was made within the state and goods delivered or installed at your place of business?

A. Of course, I have no way of knowing. I don't review the invoices every day, and I don't know whether the man came after the merchandise or whether he didn't. But it is possible that our sales tax records might reflect that differential.

Q. Just give us your best estimate, subject to correc-

tion, if we can correct it by the records, which I rather doubt can be done. But would you say a fourth, a third, or a half, anyway to guess, in accordance with your best judgment on it?

* * * * * * *

25 In your best estimate, what percentage would reflect the installation to—delivery locally here where the billing is outside the state? Just give us that the best of your knowledge.

A. Mr. Burch, it would have to be strictly a guess, but I know it is lots of it, and could be at least twenty-five or thirty or thirty-five percent of it, but——

Q. Now, you were asked about the recapping. Do you sell many recaps?

A. We sell very few. Practically all of our business is consumers—customer recaps.

Q. Actually, the recapping business is a business
26 of furnishing service rather than of sales, is it not?

A. Correct.

Q. So that the Court will understand it, just give us an example of a typical recapping transaction.

A. Well, recapping transaction is that we find a prospect who has smooth tires on his vehicle—automobile, truck, earthmoving machine, whatever it may be—and we solicit his business to recap his tires, and we return the same tires that are removed.

Q. So he brings in his tires and he gets back his tires?

A. Right.

Q. And what you have furnished him is the service of recapping?

A. Yes, sir.

Q. Now, you do occasionally sell a recap, do you not?

A. We occasionally sell a recap.

Q. Approximately what volume of the recapping business is involved in such sales of recaps as distinguished from furnishing recapping service?

A. Well, I doubt if it is over five or ten percent.

Q. Now, that is in the general business, but what of the recapping business?

A. What is that?

Q. Five or ten percent has reference to——?

27 A. Five or ten percent of the recapping business, yes.

Q. Now——

A. (Continuing) And again, that is a guess. But it is very infinitesimal.

Q. It is not a substantial factor in your business, is it?

A. No.

Q. Now, where are these retreading services performed with reference to the physical layout of your plant?

A. We have an area of our building of about fifty percent of it that is devoted to the recapping of tires and repairing.

Q. Well, is that all done under one roof?

A. Yes, sir.

Q. And that is all in Memphis, Shelby County, Tennessee?

A. Yes.

Q. And now, Mr. Steepleton, during the year 1960, did your sales—your annual gross sales of goods and services of all tires aggregate as much as one million dollars?

A. No, sir.

Q. Have you ever sold in the aggregate of goods and services as much as one million dollars?

A. No, sir.

Q. During the year 1960, state whether or not more

28 than fifty percent of your annual dollar volume of sales was made within the State of Tennessee?

A. Yes, it was more than fifty percent.

• • • • • • • •

31 Q. Mr. Steepleton, state whether or not more than fifty percent of your annual dollar volume of sales is made within the State of Tennessee, and was so during the year 1960.

32 Mr. Ray: Conclusion.

A. They are, yes, sir.

Q. And were they during the year 1960?

A. Yes, sir.

Q. State whether or not more than seventy-five percent of your annual dollar volume of sales consisted of sales which were not for resale during the year 1960.

A. Yes, they were more than seventy-five percent.

Mr. Ray: A conclusion.

Q. More than seventy-five percent were for sales of goods that were not for resale but for ultimate consumers during the year?

A. Yes, sir.

* * * * * * *

34 By Mr. Burch:

Q. Now, Mr. Steepleton, you know the meaning of the word "resale", don't you?

A. Yes, sir.

Q. And does the word "resale" mean to you that when a person buys something that they then sell it to another customer, it was resale——?

A. That is my understanding of it. And that is considered a wholesale sale within the industry.

Q. Now, do you know what the words "ultimate consumer" mean?

A. The ultimate consumer is the man that uses the commodity.

Q. If a man buys tractor tires and puts them on his own tractor and uses them up plowing his cotton, is he the ultimate consumer?

A. He is the consumer.

Q. If Kroger Company buys truck tires for their
35 fleet and puts them on their trucks and uses them up on the highway, are they the ultimate consumer?

A. They are the ultimate consumer.

Q. If Joe Doakes Tire Company buys tires and puts them in the inventory and exposes them to the market for sale, is that for resale as you are using the terms?

A. That is my understanding.

Q. All right. Now, I want to ask you this, as a matter of fact.

State whether or not more than seventy-five percent of your annual dollar volume sales consisted of sales which were to the ultimate consumers and not for resale during the year 1960.

• • • • • • • •

36 Q. During the year 1960, Mr. Steepleton, were more than seventy-five percent of your annual dollar volume of sales made to ultimate consumers and not to resellers?

A. They were.

Q. Now, you have previously answered me about the sale of retread tires. They are known in your business as stock recap, are they not?

A. Yes.

Q. State whether or not during the year 1960 that more than eighty-five percent of the stock recaps were sold in the State of Tennessee.

A. State that again, Mr. Burch. I did not quite understand it.

Q. These are technical questions, and I want to ask them to you right and be sure that you understand.

That more than eighty-five percent of your retreaded tires which were sold during the year 1960 were
37 sold in the State of Tennessee.

A. They were.

Q. Now, during the year 1960, was as much as fifty percent of the annual dollar volume of your income from sales and services made up of sales of stock recaps?

A. A very small percent of it.

Q. I asked you if it was as much as fifty percent, Mr. Steepleton.

A. No, sir.

Q. It was less than fifty percent.

A. Yes, sir.

Q. Now, I want to ask you, from your long experience in the tire business, I want to ask you in the language used by the statute, in the particular industry of which you are a part, is a sale to an ultimate consumer and which is not for resale recognized as a retail sale in that particular industry?

• • • • • • •

41 By Mr. Burch:

Q. Mr. Steepleton, based upon the years of experience about which you have testified, state whether or not in the tire industry a sale to an ultimate consumer is considered in that industry as a retail or wholesale sale.

A. I started in the tire business in '38 as an employee of another retail independent tire dealer. Subsequently, I went to work for the General Tire & Rubber Company as one of their territory salesmen. And then I became later a store manager for a company owned store, and since that time was able to purchase the stock in that company and acquire it as my own business.

Always, with every type or phase of the industry that I have had anything to do with, the sales to the ultimate consumer has always been recognized as a retail sale.

Q. Now, would not that——

A. (Continuing) And the only other division or classi-

fication in sales in this industry is a sale to another
42 dealer for resale.

Q. And that is classified as what?

A. As wholesale.

* * * * * * *

44 **ARNOLD E. HIRSCH,**

having been first duly sworn, testified as follows:

* * * * * * *

48 **Cross-Examination,**

By Mr. Burch:

Q. Mr. Hirsch, your place of business where your garage is—the checks and mounting of tires—is located where?

A. At 2330 Frisco here in Memphis.

Q. State whether or not any tires that you might have purchased from Steepleton in 1960 and any recaps that you had recapped by Steepleton that year were delivered to you at those premises.

A. It is my understanding that they were delivered there. I know they were delivered to that address, sir.

Q. As far as you know, every delivery, either a new tire or recap, that was made by Steepleton in 1960 was made at Memphis, Shelby County, certainly, either at his place or your place; you could be sure about that, would you?

49 A. I think that is correct.

Q. Now, you have stated your company buys some tires—or bought some tires in 1960 from other people than Steepleton; that is correct, isn't it?

A. Yes, sir.

Q. State whether or not the tire business, like the grocery business, is a highly competitive business.

A. Well, I suppose it would be. There is quite a few people trying to sell tires.

Q. You are going where you can get the best price and the best service, aren't you?

A. Yes, sir.

Q. There is no reason why you would buy the General tire at a certain price if you could get a Firestone tire for fifty cents cheaper?

A. If we could.

Q. Not going to argue about which is the best tire?

A. That is right.

Q. But, assume that all the major brands are the same, generally, comparable in price, service has a good deal to do with where you give the business, hasn't it?

A. That is right.

Q. And the tire prices have fluctuated and continually have changed—you have bought tires at other
50 places, you have testified?

A. Yes, sir.

Q. Now, when you deliver a tire for recapping to Steepleton, do you get back recapped the same carcass that you delivered?

A. Yes, I think we do.

Q. Now, does a truck always choose a forty hour week to break down in, or do they sometimes break down at night, holidays, Sundays, or weekends?

A. Yes, sir.

Q. And when they break down, whether it has been in a forty hour week or the middle of the night, they expect somebody to give them service.

A. Our garage man tries to call someone to perform that service for him, yes, sir.

Q. Does Steepleton then have service available on weekends or holidays?

A. I think my garage man said that he did, yes, sir.

Q. To the extent of your knowledge, he does, doesn't he?

A. Yes, sir.

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51 **HOWARD CROOM,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

* * * * * * * *

54 Q. When recapped tires are delivered to Southwestern Transportation Company, do you know whether they are tires which belong to that company and which have been recapped at the Steepleton Tire Company recapping plant?

A. As far as I know, they all belong to Southwestern.

Q. Is it the practice for Steepleton Tire Company to put a tag or a label on the particular tire so that you can return the same tire to Southwestern that you have removed from their equipment?

A. Yes, sir, they are all tagged.

Q. In other words, that would be customer recapping done by Steepleton on Southwestern's own tires?

A. Correct.

Mr. Tincher: You may have the witness.

**Cross-Examination,**

By Mr. Burch:

Q. Mr. Croom, where is the Southwestern Transportation Company located?

A. I don't know the exact address of them.

Q. Is it in Memphis and Shelby County, Tennessee?

A. Yes, sir.

Q. And that is where those deliveries are made

55 and where this work of supplying recaps goes on?

A. That is right, at their terminal.

Q. Now, you haven't got anything to do with sales, have you?

A. No, sir, I do not.

Q. But you do supervise deliveries and you do know in general the customers who receive these deliveries from the trucks that are under your supervision, do you not?

A. Yes, sir.

Q. Do you know generally who they are?

A. Generally, not all of them.

Q. State whether for the most part they are users who use tires and who do not resell tires.

A. They are users of tires.

Mr. Burch: That is all.

Just a moment.

Q. With reference to your trucks, you have got three routes of what you call country trucks, haven't you?

A. Yes, sir.

Q. And one of them goes north here in Tennessee. That is its general run, isn't it?

A. Yes, sir, that is what I say.

Q. And you stated that the others went out of the State four days a week. Do you mean go out of the State or go out of Shelby County four days a week?

56 A. They go out of Shelby County.

Q. That is what I wanted to clarify. About how many days a week do you have a country truck going into some other state than Tennessee?

A. Some other state—we go to Mississippi on Tuesday and Arkansas on Thursday.

Q. And what points—?

That is two days a week you go out of the State of Tennessee, isn't it?

A. That is right.

Q. And who are the principal customers in Mississippi

and who are the principal customers to which deliveries are made?

A. I am not familiar with the customers out from this perimeter of Memphis here, the general vicinity.

Q. I see. So the country trucks go out two days a week, one truck goes to Arkansas, one truck goes to Mississippi, the rest are just used in the County?

A. Yes, sir.

Mr. Burch: That is all.

• • • • • • • •

59 **Recross-Examination,**

By Mr. Burch:

Q. Mr. Croom, this truck that goes one trip into Arkansas a week and one trip into Mississippi a week, is it a big over the road transport trailer or is it a service truck?

A. It is a service truck. It is a little larger than the usual run we have.

Q. And in addition to whatever tires and retreads it carries on that, they are equipped with tubes, they carry a compressor and tire tools, things of that sort, I think?

A. It does.

60 Q. Now, you are with the Service Department, aren't you?

A. Yes, sir, that is correct.

Q. Do you give service on weekends?

A. Only emergency service.

Q. If one of your customers breaks down at one or two o'clock on Sunday night, can he get service with Steepleton?

A. Yes, sir, if he will call either the service man or myself, and we will make arrangements to help him that night.

Q. And is that true on a holiday?

A. That is true nights, holidays, any day.

Q. Anybody that is one of the customers of your company, when he has got to have service, he gets it?

A. If he has got to have it, he will get it.

Q. And that doesn't matter about forty or fifty hours, Christmas, holidays, day or night, he gets it?

A. Yes, that is right.

* * * * * * *

61 **JAMES H. MICKLISH,**

the next witness, having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. Would you state your name, please, sir.

A. James H. Micklish.

Q. By whom are you employed, Mr. Micklish?

A. The United States Department of Labor.

Q. In what capacity?

A. As a Wage-Hour investigator.

Q. And in that capacity, did you make an investigation of the Steepleton General Tire Company right here in the City of Memphis?

A. Yes, sir, I did.

Q. When was that investigation made, Mr. Micklish?

A. In May of 1961.

Q. Would you describe briefly what your investigation consisted of at that time?

A. Consisted of conferences with management, inspecting and transcribing records, and interviewing employees and former employees.

Q. Did you make any observation of the establishment, the work that was being done there?

62 A. Yes, sir, during the investigative period I of course observed the work of employees of the company.

*Testimony of James H. Micklish*

Q. Since May of 1961, have you done any further investigative work at Steepleton Tire Company place of business?

A. Yes, sir.

Q. When was that, and briefly what did it consist of?

A. Sir?

Q. I say when did you do it, briefly what did it consist of?

A. Well, a part in January and part in February of 1962, I transcribed—I checked and transcribed the invoice records of Steepleton General Tire Company. And in the latter part of February and early part of March, the first couple of days in March, '62, I again entered the establishment to review and transcribe accounts receivable, records, among other things.

Q. All right. And from the accounts receivable records, did you prepare any transcription relating to customers of Steepleton Tire Company who are located outside the State of Tennessee?

A. Yes, sir.

Q. I hand you here some yellow sheets in a folder and ask you to tell us what those sheets consisted of.

A. That is the transcription from Steepleton General Tire Company accounts receivable records of sales
63 made to customers outside the State of Tennessee.

Q. In what year?

A. In the year 1960.

Mr. Tincher: If the Court please, counsel for defendants has been furnished copies of these transcription sheets in a slightly different arrangement than we have here, and in discussion with Mr. Mitchell, we have agreed that after they have been put in evidence that we will help them to arrange their sheets—their copies in the same order.

So with that explanation, I wish to offer the transcription sheets which have been identified by the witness as Plaintiff's Exhibit number 1 in the case.

(Thereupon, said folder of sheets was accordingly marked as Plaintiff's Exhibit 1, and same will be found among the exhibits in the cause.)

* * * * * * *

Q. Do these transcription sheets, Mr. Micklish, which have been made Exhibit 1, reflect dollar volume of sales to these out-of-state customers as shown by the defendant's records?

A. Yes, sir, so far as I could pick them up. Of course, the possibility exists that I overlooked some of
64 them. But they do reflect substantially the total dollar volume.

Q. All right. Do you have the total dollar volume figure of sales to out-of-state customers as reflected by these transcription sheets here which have been made Exhibit 1?

A. Yes, sir.

Q. What is that amount?

A. $86,850.59.

The Court: What does that figure refer to, now? Total volume of out-of-state sales?

Mr. Tincher: Yes, sir, the sales to out-of-state customers in '60.

Mr. Burch: I don't think it is going to make any difference, but is that tendered to the Court as sales to out-of-state customers or billings to out-of-state customers.

Mr. Tincher: I am not sure that we are in position to differentiate, if there is any distinction, because they are taken from the defendant's own records.

Mr. Burch: Well, they are then the records of the defendant which show billings done to out-of-state customers, is all they show?

Mr. Tincher: Yes.

Mr. Burch: That is all I want to know.

Mr. Tincher: Taken from the accounts receivable ledger.

* * * * * * *

67 Q. Did you in the course of your examination examine the defendant company's records that reflected sales of merchandise and sales of recapping services for resale?

A. Yes, sir.

Q. Would you look at the sheets which I am handing you now and tell us what is shown on those sheets, and where you got the information?

A. The first sheet consists of monthly totals taken from what the company calls their analysis of receivables.

The second sheet indicates sales to the International Harvester Company.

Q. From what particular ledger, if it was identified as such, are these monthly totals which you have designated dealer sales—which ledger does that come from?

A. From ledger number two of the analysis of receivables.

* * * * * * *

68 Q. Did Mr. Steepleton or did Mrs. Lauderdale tell you that they were all dealer sales as shown by ledger number 2?

A. Yes, sir, they were sales to dealers at dealers' discounts.

Q. And for purposes of resale?

A. Well, she indicated that some of them were thereafter—she certainly couldn't follow each sale along to know exactly what ordered, where ordered, but in examining the records, they were substantially all sales to other tire companies or to service stations or used car lots and the like.

Q. And what was the total figure as reflected by defendant's ledger number two, first to dealers, in the year 1960?

A. $54,276.01.

Q. Now, you have identified the second sheet in this folder as reflecting sales to International Harvester Company.

What was the nature of sales to International Harvester Company?

69 A. Those were sales of new tires and recapping to be placed on merchandise which International Harvester Company had taken in trade, and to be sold to the general public.

Q. What was the dollar value of those sales, Mr. Micklish?

A. $4,119.01.

Q. The total, then, from the two groups of sales for the year 1960 was how much?

A. $58,395.02.

Mr. Burch: Give me the sum again there. Fifty-eight thousand what?

A. $395.02.

Mr. Burch: Thank you.

Q. Are you in position to say whether that total represents all the sales by Steepleton Tire Company in 1960, which were sales for resale?

A. No, sir.

Mr. Tincher: I wish to offer as Plaintiff's Exhibit number 2 the sheets which the witness has finished testifying to.

(Thereupon, said documents were accordingly marked as Plaintiff's Exhibit 2, and same will be found among the exhibits in cause.)

Q. Mr. Micklish, did you examine the accounts receivable ledger records of Steepleton General Tire

70 Company reflecting transactions by which Steepleton transferred tires or other merchandise to General Tire and Rubber Company?

A. Yes, sir, I did. Under the accounts receivable ledger of General Tire and Rubber Company there were such transactions.

Q. I will hand you here a folder of transcription sheets and ask you to describe what information you have there, and what it relates to, whether it came from Steepleton's records.

A. Yes, sir, they came from Steepleton's accounts receivable records headed General Tire and Rubber Company, and they indicate national account sales.

Q. Now, would you explain what is national account sales, what that term means?

A. National account sales is a sale to a customer, the billing of which is handled between the home office of the tire company involved and the home office of the customer involved.

Q. Could you give an example of how that account —a national account sale is made or how it is handled by Steepleton General Tire Company?

A. Steepleton General Tire will, upon request from the customer, make delivery—request from the
71 national account customers—make deliveries of the number of tires or type tires need. They in turn will bill General Tire & Rubber Company for this merchandise.

And it is my understanding that General Tire & Rubber Company in turn bills the company involved.

Q. In that transaction, would the invoices which you examined reflect the price of the tires that were delivered by Steepleton and any commission that was charged for the handling of the transaction?

A. Yes, sir. And in addition to the national accounts transaction in this exhibit which I have explained, there are also samples of invoices to the General Tire & Rubber Company indicating the price or the cost of the tire, plus

national account commissions, or plus commissions and less certain other allowances.

Q. I notice a sheet here which has a number thirteen on it and which appears to be copied from a sales invoice.

And it bears the number 66320, and an entry: "Sold to General Tire & Rubber Company, date 11-12-60."

Does that relate to what you have described as national account transaction?

A. Yes, sir. For each national account transaction there is an invoice made out in that manner, "Sold to General Tire & Rubber Company," and you may want the invoice on it.

72 Q. And that invoice is sent to the General Tire & Rubber Company to indicate a charge which Steepleton Tire Company is making for handling the transaction?

A. Yes, sir.

Q. I notice sheet number 14, bearing number 65360, also appears to be copied from the invoice which says, "Sold to Tri-State Mack Distributor," dated 10-20-60 and bearing other information.

Does that copy relate to the same transaction that you have just described where the notation was made, "Sold to General Tire Company"?

A. Yes, sir.

Mr. Burch: Before you get beyond that, where is the entry to General?

Mr. Tincher: These two there.

(Counsel confer)

Q. I call your attention to the fact that on sheet number 14 a note—amount of dollars and cents, size, relative to the same has been recorded for this on sheet number 13, the invoice billing General Tire & Rubber Company for the same tires.

There is an amount totaled for the merchandise and

other information, totals for percentage, which I understand is the commission; is that correct?

A. Yes, sir.

73 Q. And did you say that these two sheets which you copied from invoices are representative of the national account transactions that you observed in Steepleton's records.

A. Yes, sir.

Mr. Tincher: I wish to offer as Plaintiff's Exhibit number 3 the transcription sheets relating to the national account transactions, as described by the witness.

(Thereupon, said documents were accordingly marked as Plaintiff's Exhibit 3, and same will be found among the exhibits in the cause.)

Q. Mr. Micklish, do you have totals showing the dollar volume for the year 1960 of those national account transactions as reflected by Exhibit number 3?

A. Yes, sir.

Q. And what is the total for the year?

A. $115,597.62.

Q. Can you tell me where you got that total, Mr. Micklish?

A. Yes, sir. From the accounts—from the accounts receivable records of General Tire & Rubber Company. Each individual transaction was listed, and there was a monthly total. This figure was derived from adding up the monthly totals for 1960.

Q. Does that figure coincide with your own totals

74 of day to day individual transactions which are listed?

A. No, sir. There is approximately three thousand dollars difference. The monthly totals are greater than the individual totals.

Q. But, in any event, are those monthly totals the totals that were entered on the ledger by Steepleton Tire Company?

A. Yes, sir, as monthly totals.

Q. Now, Mr. Micklish, did you examine Steepleton Tire Company's accounts receivable ledger with reference to fleet customers who operated ten or more vehicles in 1960?

A. Yes, sir.

Q. Were those—to clarify that just a little bit—commercial vehicles operated in 1960 by these customers?

A. Yes, sir.

• • • • • • • •

75 Q. Mr. Micklish, will you state whether or not in your course of the investigation and preparation of this case ascertains whether these customers that you have identified did operate ten or more commercial vehicles in 1960?

A. Well, during my initial investigation, you know, I picked up those which I felt would operate ten or more commercial vehicles.

During some later work, I received knowledge from one source or another that the customers contained in this exhibit did operate in 1960 ten or more commercial vehicles.

Q. Then, is it a fact that you do have knowledge with reference to each of the fleet accounts you have included that—in 1960 that operated ten or more commercial vehicles?

A. Yes, sir, with possibly one or two exceptions. And those exceptions will be based on information that was obtained—well, from Steepleton salesmen, for instance.

76 Q. In the depositions which the salesmen gave?

A. Yes, sir.

• • • • • • • •

Mr. Tincher: I will offer for identification purposes the folder which on its cover bears the caption "Fleet Accounts and P. & L. Statement," and other

77 descriptive terminology, as Plaintiff's Exhibit number 4.

Mr. Mitchell: For identification.

Mr. Tincher: For identification.

(Thereupon, said documents were accordingly marked as Plaintiff's Exhibit 4, for identification, and same will be found among the exhibits in the cause.)

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106 **Direct Examination (Further),**

By Mr. Tincher:

Q. Mr. Micklish, have you in the course of your examination of defendant company's sales records made any transcriptions that related to sales of recapping exclusively, or recapping work?

A. Yes, sir, I did. From the sales invoices, I made transcription of recapping work to certain customers.

Q. I will show you here a folder with transcription sheets, some of which have been labeled Kroger, and others Southwestern, and ask you whether those transcription sheets relate only to recapping by Steepleton Tire Company?

A. Yes, sir.

• • • • • • • •

107 Q. Did Mrs. Lauderdale make a statement to you with reference to the price at which recapping was done for the customers that you have listed here in this group of transcriptions?

A. No, sir, I don't believe it was Mrs. Lauderdale. I believe it was Mr. Steepleton.

Mr. Tincher: All right.

A. (Continuing) ——Who indicated—who told me that sales of recapping to certain customers were at less than what they called their customers list prices, less than the printed price.

Q. When did Mr. Steepleton give you that information?

A. This was during the initial investigation.

Q. In May of 1961?

A. Yes, sir.

Q. Did he identify any of those customers for whom the recapping was done at less than this commercial rate?

A. Yes, sir, he named Wilson and Company,
108 Kroger, Continental Baking.

Q. Stewart's?

A. And possibly Stewart's. Yes, Stewart's, Incorporated; possibly a couple of others, but those are the ones I recall definitely.

Q. Do these transcription sheets relate to those customers, among others?

A. Yes, sir, those and others.

Q. Now, with reference to that price for recapping, did you examine sales invoices to determine whether other customers were getting such discounts or lowered prices for the recaps?

A. Yes, sir.

Q. And in this group of transcriptions, have you included only those which you found were getting their recapping done at less than the usual commercial rate?

A. Yes, sir, at less than the commercial list price for any of those tires, which were receiving this discount here. There are several types of tires on which they did not receive that discount, but they did on some of the others.

Q. If I understand it correctly, then you have included in this group of transcriptions the sales recappings to a limited number of Mr. Steepleton's customers who on the particular tire that you have included in this list were given less than the commercial rate?

109 A. Yes, sir.

Q. If any of these particular customers had recapping done at any time for the same rate as the ordinary run of customers, did you or not leave out the transcription relating to such recapping?

A. Well, the transcription would be in there, but I did not include it in the totaling those sales. The transcription itself would be in there, if that occurred.

Q. Yes, sir. The totals which you have made, then, relate only to the sales of recapping at less than the regular commercial rate?

A. Yes, sir.

Mr. Tincher: I wish to offer this group of transcriptions as Plaintiff's Exhibit number 5.

Mr. Mitchell: Let's see it before it goes in.

A. (Continuing) Sir, also included in there——

Mr. Tincher: The witness has a little explanation, I believe.

A. (Continuing) ——also included in that are the transcriptions which I took from the invoice records showing sales to customers other than those customers, for comparison purposes. They appear in the back.

Mr. Mitchell: Where do they start, Mr. Micklish?

110 A. They are on the back there.

Q. If I understand it correctly, then, the sheets at the back of that folder which start with page number two relate only to your sales comparison and not to the amount from which you have derived the total, is that correct?

A. Yes.

Mr. Tincher: Plaintiff's number 5.

(Thereupon said documents were accordingly marked as Plaintiff's Exhibit 5, and same will be found among the exhibits in the cause.)

Mr. Tincher: I wish to offer this in evidence at this time, Your Honor.

Q. Now, Mr. Micklish, did you arrive at a total figure in dollars and cents for the type of sales which you have described, and which total will be taken from Plaintiff's Exhibit number 5?

A. Yes, sir.

Q. What is that total, please?

A. $24,951.00.

Q. Mr. Micklish, I hand you here a printed folder which is headed "Interpretative Bulletin, Title 29, Part 779," and ask you to tell the Court what that is, if you will.

A. This is a Department of Labor publication, Interpretative Bulletin, which established—this is the
111 criteria for retail type establishments, and it is the bulletin which I used in determining or in applying these totals to determine whether or not Mr. Steepleton's operation was a retail establishment.

Q. Will you look at the last page of the bulletin and tell us from that the date of the issue of this particular bulletin?

A. January 1960.

Q. Was this the bulletin that was being used by you at the time you made your investigation in May of 1961?

A. Yes, sir. There may have been some—I don't know —some new printings come out on it but this is the same bulletin.

Q. Will you turn to that portion of the bulletin which applies to the automotive tire industry?

A. It is on page 32, section—no, it is on page 33, section 779.37.

Mr. Burch: Now, if Your Honor please, just to show Mr. Tincher and Mr. Ray that I am really a pleasant individual, this is not authenticated properly, this is not in proper form to go in evidence, but I make no objection to it.

I do make objection to the substance of it as being contrary to the statutes of the United States.
112 I merely wish to record the objection, Your Honor, and will say more later on.

The Court: All right, sir.

Mr. Tincher: With that observation from counsel, I will offer the bulletin described by the witness in evidence as Plaintiff's Exhibit 6.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 6, and same will be found among the exhibits in the cause.)

* * * * * * *

113 **Cross-Examination,**

By Mr. Mitchell:

* * * * * * *

115 Q. Now, then, Mr. Micklish, in your Exhibit 1 in evidence here at the trial, you have accumulated under the heading "Out-of-state Sales" a number of sheets of paper which reflect—which you took off of the invoices at Steepleton's place of business, and you come up with a total I believe of $86,850.59.

116 A. Yes, sir, but they were not taken off of invoices. They were taken off of accounts receivable.

Q. But from the records?

A. Yes, sir.

Q. And, if I understood your testimony a moment ago, that it does not include—that is, this Exhibit 1 to your testimony here today does not include new or different things in addition to what you had at the time we took your deposition for the last time in this case, in terms of the out-of-state sales records.

A. No, sir, it includes nothing new.

Q. Now, then, actually the term "out-of-state sales," as used by you, according to what you maintain is a synonym, namely, sales in direct commerce, is it not?

A. Sales in commerce, yes, sir.

Q. But do you not use sales in direct commerce to include sales to persons whose billing addresses, what not, may be out the State of Tennessee, and also include

such things as sales to manufacturers or sales to persons who perhaps operate themselves in interstate commerce?

Isn't that then generally what Labor Department employees mean when they say sales in direct commerce?

Mr. Micklish, there is no occasion to be thoughtful. I am doing my best to paraphrase the definition you
117 gave me at the time of taking your deposition. If my paraphrase is inaccurate, tell me. If not, tell me, and we will go ahead.

A. It is substantially correct, sir.

Q. Is that what you have included in this term "out-of-state sales," Plaintiff's Exhibit 1?

A. Yes, sir.

Q. All right, you say it is based on the same information you had at the time I took your deposition?

A. Yes, sir.

Q. At the time I took your deposition, your total for this same figure, "Now, what is the total according to your tape of all such sales in direct commerce?"

This is by you: "$85,429.67."

Mr. Mitchell: Mr. Tincher, I am referring to page 49 of the second phase of Mr. Micklish's deposition.

Q. (Continuing) I want to know what is the difference between that figure, if it were done by adding machine tape, and the figure you have just come up with there, $86,850.00, if they are not based on different sub-totals or sub-categories?

A. What is the figure?

Q. $85,429.67.

A. I can't account for it, sir, unless there was an error in arithmetic. I can't recall that I included any-
118 thing I had previously included.

Q. Well, that is your testimony?

A. Yes, sir.

Q. That this Exhibit 1 is based on what we have been talking to between ourselves about before.

A. Yes, sir.

Q. Actually, at the time you first audited, before this lawsuit was filed, did you come up with a figure at that time for out-of-state sales, any precise total.

A. No, sir.

Q. And Exhibit 1 plainly includes all sales made to customers who have billing addresses out of the State of Tennessee, is that not correct?

A. Yes, sir, although with possibly one or two exceptions, which I believe you will find on the inside.

Q. Well, you filed the exceptions, sir?

A. Yes, sir. Joe Simpkins Leasing Company, St. Louis, Missouri, was one that I excluded.

Q. On what basis, Mr. Micklish?

A. Well, it was my understanding that the company did not operate outside of up in Missouri, and I wasn't quite sure how that way—a way like that would come about, so I excluded it. I believe that another is
119 Ramon Rine at Osceola, Arkansas, is a one shot dealer, one or two shots.

Q. But for the rest of the Exhibit 1 exhibits sales to customers, you had out-of-state billing addresses?

A. Yes, sir.

Q. And you did not even attempt—I believe I am correct—if not, tell me where I am wrong—you made no attempt to determine whether or not the sales were actually made—the deliveries made to any or all of these companies right here at the Steepleton Company on Monroe Avenue in Memphis, Tennessee?

A. That is right.

Q. To the extent that there are included in your Exhibit 1 invoices or accounts receivables records to reflect the sales made, transactions completed or deliveries made at 246 Monroe, the defendant's store, they would not be out-of-state sales, would they?

A. Sir?

Q. To the extent that anything in here reflects accounts receivable or invoices, whatever you copied them from, that were in fact transactions completed and deliveries made at 246 Monroe Avenue, Memphis, Tennessee, which is the location of Steepleton Tire Store, they would not be out-of-state sales, would they?

A. No, sir, I think they would be out-of-state sales.

120 Q. Your exhibit would be, therefore, in error at least to that extent?

A. No, sir. I say I think they would be out-of-state sales.

Q. Even though the whole transaction or delivery to the customer took place on Monroe Avenue in Memphis?

A. Yes, sir. The customer takes his vehicle and tires back over the West Memphis, Arkansas, and he is later billed at West Memphis, Arkansas, I think he is an out-of-state sale, yes, sir.

Q. That is the basis on which you accumulated your exhibit 1?

A. Yes, sir.

* * * * * * *

125 Q. Now, how did you go through the breakdown behind those totals in Exhibit 2 to determine whether or not there were duplications in here of the details, in other words, in exhibit 1, and because you have already pointed out you did not.

Mr. Tincher: If Your Honor please, let me see if I can clarify that point.

In substance, you see——

Mr. Mitchell: Mr. Tincher, if you will tell me, without telling him, but let this witness, in other words, answer the questions, unless you have objections.

126 Mr. Tincher: As I understood it, you did not call for an answer to the last question.

But I think the form of the question calls for clarification which I am now preparing to make.

A. The sales for resale relate to the exemption question. The sales to out-of-state customers relate to the coverage issue. Obviously, there are duplications, because many of these sales to out-of-state customers were for purposes for resale. At least, some of these were.

We did not attempt to make a breakdown to determine what portion of the sales to out-of-state customers related only to the question of engaging in interstate commerce, whether those customers probably fall within some of these additional groupings, as sales for resale, to fleet customers, or recaps at less than retail prices.

Those items have no relation, actually, to the Interstate Commerce Commission, and whether they fall in both groupings or not would be a fortuitous circumstance.

We are quite sure there are some customers in both groupings.

Q. All right, now, with regard to sales to International Harvester, which you have classified here as sales for resale—is that correct—every invoice, every receiv-

127 able, every anything else you could find on Steepleton's records with respect to International Harvester are included in the total, which I believe is the sum of four thousand one hundred nineteen dollars and a penny?

A. Yes, sir.

Q. Or thereabouts?

A. Yes, sir.

Q. To what extent did you examine or determine whether or not Steepleton makes any sales to International Harvester for their own use?

A. We contacted Mr. Weaver at International Harvester, who indicated that all sales made by Steepleton to International Harvester were to be placed—for tires to be placed on their vehicles to be resold.

Q. And you determined then from International Harvester that Steepleton only sold to them for resale?

A. Yes, sir.

Q. Did you go down and make any determination with respect to the other accounts accumulated among those sales for resale you had to the same effect, that is, whether or not the particular purchaser might buy a part for resale and a part for consumption?

A. No, sir.

128 Q. No, sir. To what extent, then, and how many different accounts, or what not, are subject to possible error on that score? Are all of them other than International Harvester—are they accumulated on sales for resale?

A. All of them other than International Harvester are tallied in invoices with respect to receivables ledger number 2, and in my understanding, sales to dealers.

Q. And that is accumulated by category of customers on Steepleton's books, not by use made by customers of tires?

A. Yes, sir, by category of customers.

Q. Now, with regard to national accounts transactions, you did not have any figure for national account transactions, as I recall, when we took your deposition the second time in this case, did you?

A. I should have, yes, sir.

Q. Well, where did you get the one you testified here about today of one hundred fifteen thousand dollars?

A. From accounts receivable records, of Steepleton Tire Company, under the heading "General Tire & Rubber Company."

Q. Were you not told on more than one occasion, and emphatically on the second and third occasion, by Mrs. Lauderdale—perhaps on another—that this memorandum account of General Tire Company was not a part of the

regular, routine accounts receivable records of Steepleton Tire Company?

129 A. I can't recall that I was, no, sir.

Q. Did you inquire at all as to whether or not—or why it was the General Tire Company account was kept separate, or did you observe anything different in the way they were kept?

A. They were not kept separate, sir.

Q. Is it a fact, sir—pardon me, I did not mean to interrupt.

A. (Continuing) They were kept in the same file cabinet with the rest of the accounts receivable records and were filed alphabetically as with the rest of them. They were—they did differ on the face of them from the other accounts receivable records.

Q. Yes, sir. Were not those then carried simply in a memorandum account, by which certain information was accumulated until month's end when it can be cleared on some kind of clerical sheet with General Tire Company.

A. Yes, sir, substantially that is right, yes, sir.

Q. And that was the was—that constituted actually the way the accounts were in fact worked, that is, they appeared to be at least transfer memorandum accounts, did they not?

A. I could not tell from the records whether they were memorandum accounts or not. The amounts appeared on the face of the records, the amount of the

130 transaction.

Q. Well, could you tell from the invoices themselves whether the absence of any dollar amounts from the invoices—did that indicate to you some difference?

A. On the invoices to General Tire and Rubber Company there were dollar amounts. On the invoices which corresponded to those national account sales and which were invoiced to the customer, there appeared no dollar amount.

Q. Now, isn't it true, Mr. Micklish, that no dollar amount appeared on anything that the Steepleton Tire Company prepared with reference to the delivery of a certain size or type tire or tires to a customer, that the dollar amount appeared on what went in to the home office, that is, General Tire Company's home office, and the only dollar amount shown was inventory cost to Steepleton of the tire furnished?

A. Yes, sir, along with several other additions and deductions.

Q. From the value of the product, or Steepleton's own inventory cost—that is what that is, is that right?

A. That is my understanding of what it is, yes, sir.

Q. Then there would be certain allowances or deductions, depending on the amount of service, and so forth, rendered General Tire Company's customers?

A. Yes.

Q. And the transaction by General Rubber—at least by General—I assume any dealings were by Steepleton
131 Tire Company with the customer of General Tire Company, the Akron Tire Company, for a price Steepleton does not know, whereupon, after the delivery is made, the Akron General Tire Company—The General Tire Company at Akron, replaces Steepleton's inventory and pays it some agreed service charge or commission, or how ever you want to call it.

A. It is my understanding that they credit their account. I was not aware that they replaced the inventory.

Q. I will take that correction. I don't know whether the inventory is replaced in kind or value.

A. Yes.

Q. But, in any event, the cost of the unit furnished is thereafter adjusted somehow with Steepleton, and that was made in the form of their commission for whatever is done?

A. Yes.

Q. And this is not kept as a part of their regular accounts receivable records at Steepleton Tire Company?

A. Again, they are filed with the accounts receivable records, and they are kept with them. They are different transactions, though, certainly.

Q. What information, if any, did you get from Mrs. Lauderdale, again, with regard to those, either that you designated at the time of your first—and I am sure your subsequent investigations—that this was something
132 different, these were memorandum accounts, these were not our accounts receivable, these are not customers, these are the basis of claims we make with General Tire Company?

A. She advised me that they were their national accounts.

Q. Now, then, with respect to this next exhibit, which I think is Exhibit number 5, in which at the back some several pages you have accumulated of apparently an inch thick, of which are invoices, the heading "Recapitulation of Sheets Number 2—2 through 6" apparently, and I hand you this, and I ask you if those particular last few sheets of your Exhibit number 5 were not prepared by you in an attempt to get at a differential, if any there might be, between the price at which Steepleton General Tire Company did recapping services for some customers and the price at which the same company rendered the same service for a different company?

A. Yes, sir, it was taken for comparison purposes.

Q. And after you had prepared those sheets and had analyzed them or reviewed them in the office, and in the taking of the last of your depositions in this case—let's take it on back—do you not admit that there was practically no difference in the price charged by Steepleton for its various recapping customers, that is that there was a standard, uniform price?

133 A. With certain exceptions, yes, sir.

Q. Yes, sir. But this is a general statement that there was not much variation, it is pretty well a fixed price?

A. With certain exceptions.

Q. And at my request, you went through and made application of the last five or six sheets to your Exhibit 5, I believe—pardon me, let me check, just so the record will be correct—yes, the last few sheets of your Exhibit 5, and you made red circles around the invoice numbers of certain of the entries on those last few sheets.

Is that not true, that that was done because after you reviewed the analysis of the sheets you realized that you had made a mistake with respect to each one of the invoices which is circled in red, in terms of their being a price differential between one category and another category of customers?

A. No, sir. As far as the recapping goes, all these customers listed here, whether they are one, whether a small fleet operator or operator of several vehicles, received recapping at prices—at comparable prices.

Q. Yes, sir. So that there is not a differential made between prices charged for recapping by Steepleton to a customer with regard to whether he has got one, two, or many vehicles?

134 A. With the exceptions shown in this exhibit, that is basically true, yes, sir.

Q. I am still talking about the last few pages of that Exhibit number 5.

A. All right.

Q. And also the red figures—numbers—you caught where you first made a mistake when you first went through checking the invoice number, you thought they were at one price and later found out you were wrong that many times, is that not true?

A. No, sir, the error was not in the pricing. It was in the size of the fleets.

You asked me to go through and check those fleets there I considered to be larger repetitive customers. And I did so. It had nothing to do with the price.

Q. Look at those there right now and see if they don't come out about the same price as the ones—the red circles of the larger repetitive purchasers.

A. Yes, sir, they do come out at about the same.

Q. And you checked them there and find, though, that you did not recognize they are larger repetitive purchasers from the prices charged them, they are all the people

—you did not recognize them as large institutional
135 purchasers that, in other words, from the price charged that Joe Doe, who never went over to Steepleton?

A. No, sir, from the material I checked that you have from me there with respect to prices, I think you may have compared prices at a later time.

Q. With respect to the first few recapitulations sheets of your Exhibit 5—and if I may, could I have that back, please, sir—it is your contention that respect to Carter Leasing, Continental Baking, Gordon's Transports, Kroger Company, and perhaps others, there are in fact several sheets of your Exhibit 5, that Steepleton does recap work for them at prices which is less than Steepleton does recapping work for other—for more general of its customers—right?

A. Yes, sir, on some tires.

Q. To what—tires—only on some tires?

A. Yes, sir.

Q. To what extent did you investigate any of these customers to find out whether the service that is rendered by Steepleton for any or all of them is the same as is rendered for the vast majority of Steepleton's recapping customers?

A. Repeat that, sir.

136 Q. Yes, sir. Let's go back a notch. Recapping is a service, is that right?

A. Yes, sir.

Q. What Steepleton gets paid for is the service they render. If they render more service to one customer, would you think it is normal to charge that customer for more service than they would charge another customer who takes on himself the obligation to render some of the service himself?

A. That is logical, yes.

Q. Do you know whether that accounts for whatever differential you found and have expressed on the first several pages of your Exhibit 5?

A. No, sir. As a matter of fact, Mr. Steepleton stated that he was more or less compelled to do that because these national accounts had—have national competitive prices for which they were paid for recapping.

Q. Another account listed on the first few pages of Exhibit 5 is the Kroger Company.

You were present in the court room this morning when Mr. Hirsch testified as a representative of the Kroger Company. I think you will recall his testimony, as I do, that at Kroger they pull their own wheels, they

137 pull their own—break down their own tires, and all the Steepleton man does is pick them up and take them back to the shop—correct? No standing order of pulling the tires at Kroger Company.

Would that not possibly be reflected in the lower price that Steepleton charges Kroger Company for its recapping business?

A. I don't know, sir; possibly so.

Q. And all you know is what is reflected on exhibit 5, and these are the invoices made out in a little bit different form, are they?

A. In some cases the invoices are different.

Q. But you do have a difference, necessarily, in the invoices and description, if it exists in the service reflected by the invoice?

A. Right.

* * * * * * *

143 Q. Mr. Micklish, on the first sheet of your Exhibit number 2, which has to do, according to its caption, with dealer sales, I notice some remarks on a memorandum form, in which I take it you have made—this whole sheet is in your handwriting, is it not?

A. Yes, sir.

Q. Now, then, you have the notation, "included in these figures are sales to Tri-State Mack, Tri-State Leasing, Southern Motors."

The other part of the exhibit—is not that what Mrs. Lauderdale explained to you that sales to Tri-State Mack were not dealer sales by Steepleton General Tire Company at all, but were deliveries to a manufacturer under a contract that Tri-State Mack has with General Tire Company at Akron?

A. Possibly she did, sir. I don't recall but possibly she did.

Q. Can you explain further the fact that you have a notation on this exhibit that something was remarked about it, some distinguishing feature was made on it to you?

A. Well, I did that for my own benefit so that I would not think later it included sales to those people or re-include sales to those people as sales for resale,

144 because I would not pick them up again in some other category and include in sales for resale.

Q. But, with respect to whether or not a sale by Steepleton Tire Company to Tri-State Mack is a sale for resale, do you recall Mrs. Lauderdale advising you sales

through General Tire Company delivered by Steepleton in Memphis to Tri-State Mack were similar to nation account transactions except they went under the manufacturers delivery agreement?

A. There was a discussion of manufacturers delivery agreement, or whatever it is called by, but I don't recall that she related it specifically to that information, although she may have done so, certainly.

Q. To any extent, did you take this manufacturers delivery transaction into account in any of your audit work or figures you have testified here today on cross-examination?

A. No, sir.

Q. With regard to Tri-State Leasing deliveries, that Mrs. Lauderdale explained that that was a company that leased vehicles or road equipment or something else, and that purchases in turn were for its own equipment to go on these vehicles that it leased?

A. Again, I don't recall, but I feel sure that she probably did, yes, sir.

145 Q. Well, you know in the list you included as resale dealers in your analysis?

A. If it is included in the ledger number 2 analysis of receivables, yes, sir.

Q. Well, there is your Exhibit number 2?

A. Yes, sir.

Q. And then with regard to Southern Motors, do you remember any explanation by Mrs. Lauderdale with respect to transactions at Southern Motors?

A. Yes, sir, as I recall she stated that for a time in—I believe would be including 1960, the company kept a salesman at Southern Motors in an attempt to sell the purchasers of new Cadillacs on the General Tire.

Q. Well, is it your understanding that there is also included, or is it in fact included in those so called dealer sales?

A. Yes, sir.

Q. Now, then lower down on the same exhibit, I see a notation, which I take it there again would be of Mrs. Lauderdale, "includes the sum of $7,759.60, Michelin Tire Company."

And that is explained: "delivered for Michelin Tire through Freuhauf and Arrow, received credit plus delivery charge."

146 A. Yes, sir.

Q. Does that refresh your memory as to why that particular notation was stated, or the notation showed?

A. Well, as I recall it, that is the only transaction there regarding Michelin Tire which appeared in the accounts receivable ledger 2, and I asked Mrs. Lauderdale about that specifically, and she made the explanation that they were sales or deliveries to those two companies, I believe, or something similar to the national account basis.

Q. Now, I believe that you, in addition to the accounts receivable, and inventory records, you have had access to a considerable amount of profit and loss statements, and also I think tax returns of Steepleton Tire Company, at least 1960 or maybe other years, did you not?

A. Yes, sir.

Q. On your audit of the profit and loss statements and/or tax returns, did you determine that the national account transactions were not there reflected in sales by Steepleton General Tire Company?

A. Yes, sir, they are not reflected as sales.

Q. And that tallies, does it not, with the explanation Mrs. Lauderdale gave you with respect to the General Tire Company and to the national account memo-

147 randum items in their regular records or books, that is, this exclusion of national accounts from the regular transactions on the books of Steepleton Tire Company?

A. It is my understanding they do not consider sales, yes, sir.

Q. All right. Now, as you testified, you worked from the Exhibit 6, which is the interpretative bulletin, the January 1960 issue, when you were preparing the audit or when you were conducting the investigation in May 1961, on which your first determination on findings was taken, and I would like to hand you this Exhibit 6 now, and ask you to turn to page 33, and let's run down this list of so called sales classifications and items pursuant to which you have contended that the—you say the automotive tire industry worked.

In the first place, am I not correct in thinking that the various classifications here attach significance to a particular tire dealer only in so far as they represent the percentage of total gross income from sales and services of the tire dealer?

A. By the percentage amount test, yes.

Q. Yes. And the distinguishing test in the percentage test is what the percentage is to the total, is that not it?

A. If they are all totaled. We have different categories, yes, sir.

148 Q. Yes. And what you would be concerned with is what percentage each one or the total of all these classifications represent of gross sales, services, of a given dealer?

A. Yes, sir.

Q. What was the total sales—services by Steepleton General Tire Company during 1960?

A. I don't have the gross dollar—annual gross dollar volume for 1960 other than the one that you—I believe you gave us.

Q. Well, what did you use, sir, for one hundred percent in making your reports and determination or finding with regard to Steepleton Tire Company in May of 1961,

or any time since then, for the benefit of your superiors?

A. In May of 1961 I used gross dollar volume, I am not quite sure now where it came from, but I would imagine from the sales tax reports, and to that I added the national account sales, to come up with that I considered the gross dollar volume.

* * * * * * *

158 By Mr. Mitchell:

Q. Well, what is the figure, Mr. Micklish, for the total gross dollar volume of sales at Steepleton General Tire Company during 1960?

A. Sir, I can give you the figures if I can step down and get my original case file. I can give the figures that I used then.

Q. But my question is this.

A. (Continuing) But I have not arrived at any gross dollar volume for the year 1960 in this present development. But I can——

Q. For clarification, how do you use "in this present development"?

Have you derived one, sir?

A. For my original investigation, yes, sir.

Q. And what was it?

A. $1,029,014.00.

159 This included national account sales.

Q. Now, would you tell me what you are referring to from your file, if I am familiar with it or if we have ever talked about it in taking of your deposition?

A. Yes, sir, in my original first analysis of my file as Exhibit E assigned——

Q. Exhibit 2 is the way it came in this record. As an exhibit to your deposition in the first instance?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. That is the exhibit Mr. Tincher has made a number of statements in the record, and which you have concurred on those, to the effect that you no longer rely on Exhibit 2 as to the conclusions reached, and the figures shown there are no longer correct, is that true?

A. Yes, sir.

Q. But that is nonetheless the figure for your gross sales, that same exhibit that has since been abandoned by the plaintiff in this case?

A. What for?

Q. That is nonetheless the only source in your work paper for the gross dollar volume of sales in 1960 of this defendant, that is, Exhibit number 2 of your original deposition?

160 A. Yes, sir, this is the only gross that I have, and in my working papers. Whatever went on between any of the other parties, I don't know, but this is the gross that I had.

Q. And that comes from what I know here as Exhibit number 2 to your original deposition, and it has since been abandoned in your testimony, the second deposition that the plaintiff no longer relies on such thing as being entirely accurate; is that not true?

A. Yes, sir.

Q. Then, using whatever you use for gross dollar volume during 1960, in this same Exhibit 6, which is the interpretative bulletin of January 1960, you have given the figure for sales for resale, and it was made an exhibit this morning, or sometime today, to your testimony.

Under the second of several classifications, there is a category "sales made pursuant to a formal invitation to bid."

Now, during any part or all of the three audits you have made of the defendant's records, did you establish a value for sales made pursuant to formal invitation to bid by Steepleton General Tire?

A. No, sir.

161 Q. And another thing regarding categories is "sales to national accounts." We already have an exhibit in regard to that. And you have indicated it is included in the total of sales by Steepleton during 1960.

A. Yes, sir.

Q. The next item is "sales to fleet accounts."

I am reading paragraph 4 in the right hand column of page 33. And I want to pick out some several points about this with you.

"Sales to fleet account at wholesale prices: As used in this section, a 'fleet account' is a customer operating five or more automobiles or trucks for business purposes."

Now, "Wholesale prices for tires, tubes, and accessories are prices equivalent to, or less than, those typically charged on sales for resale."

First, did you determine whether or not there were any truck tires and automobile tires sold for resale by Steepleton General Tire Company which you could use as the indicating measuring stick under this paragraph to determine what is here called wholesale prices?

A. Yes, sir, there were sales of new passenger tires for resale.

162 However, I ran across no sales of any truck tires for resale with the exception of two transactions involving Michelin tires.

Q. And Michelin is in sort of a separate category in this case, are they not?

Do you recall that it is generally sold at the same price, and you know it is handled more or less a second item by this defendant?

A. Generally, yes, sir.

Q. So, with respect to truck tires, I think you said you had no measuring stick to which this is related, is that correct?

A. Yes, sir.

Q. So, in this bulletin:

"If the establishment makes no sales—" Skip down.

"If the establishment makes no sales of truck tires for resale, the wholesale price of such tires will be taken to be the price charged by the establishment on sales of truck tires to fleet accounts operating ten or more commercial vehicles."

Were you able to establish that?

163 A. Yes, sir.

Q. In your opinion, do you now know which accounts have ten or more vehicles?

A. I know some of them that do.

Q. There were some thirty-four in this exhibit. Do you know that all those thirty-four accounts actually operated—buy tires for ten or more, or did in 1960, ten or more vehicles?

A. I think there are some fifty in there. And, yes, sir, I know from talking to the people at the various establishments that they did operate ten or more in 1960.

Q. And it says further that: "If the establishment makes no such sales"—then I think it will be with respect to truck tires in the Steepleton category—"The wholesale price will be taken to be the price typically charged in the area on sales of truck tires to fleet accounts operating ten or more commercial vehicles."

A. Yes, sir.

Q. Have you established what prices are in this area by competitors of Steepleton?

A. No, sir.

* * * * * * *

166 By Mr. Mitchell:

Q. With regard to those sales by competitors, which is the way I think you would have to construe this "typically charged in the area" phrase on the next to

last line of paragraph 4, did you make any determination or do you have anything in the file—any figures which show prices typically charged in this area by Steepleton's competitors?

A. No, sir.

Q. So, in applying paragraph 4, you had to go back to the prices that you determined were charged by Steepleton to fleets that you ascertained, to your satisfaction, at least, had more than ten vehicles, is that correct?

A. Well, of course, the prices charged these customers appeared on the customer's records.

Q. Yes, sir. But you had to go down and select companies that you either guessed or made some determination and came to some conclusion about the number of vehicles operated by particular customers.

A. Yes, sir.

* * * * * * *

168 A. No, sir.

Q. The next is "Sales of servicing and repair work performed under a fleet maintenance arrangement on trucks—" et cetera—"whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price."

Now, first, with respect to that, did you conduct a survey or study or make any inquiry or take any steps to determine what the prevailing retail price was for whatever kind of servicing and repairing work is mentioned in this paragraph?

A. I did not determine what the retail price was, no, sir. But I did determine that there were accounts
169 which received recapping services at less than the prevailing retail price, because they received recapping services at less than what the majority of their customers received recapping service for, and less than what the price list showed.

Q. So that when you could not perform in accordance with this paragraph 6, you just came close to it and gave up on that and was satisfied, is that right?

A. No, sir, I came up with a figure which indicates the total sales to their recapping service customers at less than prevailing retail prices.

Q. Although you said to begin with you did not establish—did not determine, you said, what the prevailing retail price is—or was in 1960, sir?

A. No, sir, I did not. But if the majority of their accounts are receiving their recapping at a greater price —price greater than these few accounts, then I considered that they were receiving recapping services at prices less than retail.

Q. Yes. And this has to do with your Exhibit—I don't know the number—but it is the one in which you have got recapping for so called fleet accounts?

A. Yes, sir.

Q. You picked up Kroger and one or two or three other larger accounts. And those figures are supposed
170 to reflect that Kroger gets the same service as does the run of the mill recapping customer of Steepleton Tire Company, but pays less for that same service, is that correct?

A. My records reflect that they pay less for their recapping service.

Q. They pay less for whatever they get. Of course, they may get something different from the way you have now qualified your exhibit, they may get less and therefore pay less, is that not correct?

A. I don't know that they get less, sir. I know that they pay less for recapping. I am sure the recapping—quality of recapping and quantity of rubber is the same in any other tire.

Q. What about the amount of service in putting the

tire off and on, or what about whether or not on the matter of when you put on—or changes them—whether or not Steepleton has got to do it then, or where the job is done? Do you know about that factor?

A. Nothing, that is right.

* * * * * * *

173 **Redirect Examination,**

By Mr. Tincher:

Q. Mr. Micklish, you were asked by Mr. Mitchell whether you had found any sales by Steepleton Tire Company that were made pursuant to governmental invitations to bid.

Do you have any information with reference to sales made to the City of Memphis?

A. Yes, sir. He asked me if I had any notations on that. I have my notes on that.

It is my understanding sales to the City of Memphis are made pursuant to invitation to bid.

Q. From where did you get that understanding, Mr. Micklish?

A. From information furnished by Mr. Steepleton.

Q. In fact, did he testify to that fact in depositions that were taken on January 3, 1962?

A. Yes, sir.

Mr. Tincher: If Your Honor please, I wish to now place in evidence the deposition of Mr. Steepleton that
174 was taken on January 3, 1962.

* * * * * * *

176 By Mr. Tincher:

Q. Now, Mr. Micklish, did you transcribe from
177 the company's records information to show sales made by Steepleton Tire Company to the City of Memphis?

A. Yes, sir, I did.

Q. Where would those transcriptions be found among the exhibits that have been here admitted or marked for identification purposes?

A. It would be found in the Exhibit 4, and also—no, City of Memphis would be part of Exhibit 4.

• • • • • • • •

179 Q. Now, Mr. Micklish, could you turn in this exhibit which has been identified as Exhibit number 4 and signed the transcription relating to sales to the City of Memphis?

(Document examined by witness)

Q. Have you found it?

A. Yes, sir.

Q. Do you have any totals with reference to sales on the sheets before you?

A. I have the columns totals, but I don't have a complete total.

Mr. Tincher: All right.

180 Mr. Mitchell: Could we have the identification there on the number of the sheet?

Mr. Tincher: Yes.

Q. Would you give the number of the sheet that relates to sales of the City of Memphis.

A. Pages twenty, twenty-one, twenty-two of the Exhibit that is now 4, but which in my original deposition was 13-B.

Q. In addition to sales to the City of Memphis, Mr. Micklish, did you obtain from the company's records transcriptions of the sales to other governmental units?

A. Yes, sir.

Q. What—which of your exhibits will that cover that has been made part of the record in this case?

A. They appear in two different exhibits now, Exhibit 4 pertaining to the fleet account sales, and also listed in

the Exhibit 1 pertaining to the out-of-state customers, as some of these counties and city governments were outside the State of Tennessee.

Q. Would those sales be duplicated in both exhibits, or would part of those sales be reflected by Exhibit number 1 and part by Exhibit number 4?

A. There is no duplication at all. Part of them will be part in Exhibit 1, and part of them in Exhibit 4.

Q. In what category of sales with reference to the
181 interpretative bulletin that was made Exhibit number 6 did you include these sales to various governmental units such as the City of Memphis and various counties, schools, road developments, and so forth, in other states?

A. I included them in the category with the fleet accounts operating ten or more vehicles.

Q. Did you ascertain during the course of your investigation whether or not the price charged by Steepleton Tire Company to the various governmental units was greater or less or the same as the price charged to the fleet accounts?

A. That is normally on what is called State list price, which is at less than it would normally—what the fleet account would pay.

Q. Does that relate to new tires, or to recaps, or both?

A. No, to new tires, to new tires only.

And during my initial investigation, Mr. Steepleton indicated that the price charged these governmental units were in many cases less than his purchase price—his cost.

Q. All right. Did you learn the manner in which Mr. Steepleton is able to complete transactions to these governmental units at less than his purchase price without losing money?

A. Yes, sir, he is credited with his purchase price
182 plus a certain percent for selling tires.

* * * * * * * *

186 **FRANK PHILLIPS,**

having been first duly sworn, testified as follows:

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189 **Cross-Examination,**

By Mr. Burch:

Q. Mr. Phillips, where is your place of business located?

A. 507 East Brooks Road.

Q. We are concerned only with the year 1960. And in that year, according to best recollection, you operated about sixteen vehicles, half leased and half owned?

A. Yes, sir.

Q. Is that substantially correct?

A. Yes, sir.

Q. Under the provisions of your lease contract, was it up to you to furnish the tires for the leased vehicles, or did they come with the lease?

A. No, sir, they furnished everything.

Q. So you weren't involved with the tires for those vehicles at all, were you?

A. No, not unless they asked me.

Q. Yes, sir. With reference to the tires you bought from Steepleton, would you say the tire business is a highly competitive business?

A. Yes, sir, it is.

Q. As a matter of fact, you, like most people, you go where you get the best price and the best service?

A. That is right.

190 Q. As a matter of fact, or really, you haven't bought many new tires from Steepleton, have you?

A. No, I haven't bought any tires from him in over a year.

Q. We have got some lawyers from some of these territories here and don't want to hurt their feelings any more than necessary, but actually, if a man can get a good

price, it doesn't make much difference whether it is Firestone or Goodyear or what?

A. No, sir.

Q. Did you get servicing with the tires you bought from Steepleton?

A. See, most of my business with Steepleton was recapping. I would get recaps. He would come pull the tires, mount my tires, and thereafter he would bring the tire when he finished with it. But back in 1960, I bought very few tires from him.

Q. With reference to recapping, did you use all those recaps yourself or did you sell some of them?

A. I can't answer that completely. I would say I used ninety-five percent of them.

Q. You bought them——?

A. I might sell them only in a tight, if a boy had to have a tire or something. I did not get them for sale, is what I am saying.

191 Q. As far as both intended and normal use were concerned, you used those recapped tires?

A. Yes, for my own use.

Q. And did not hold those recaps in stock for sale to a customer?

A. Oh, no, sir.

Q. In so far as the recaps you got from Steepleton, even though you had bought and paid for the tire, Steepleton did continue to give service, did he not?

A. Yes.

Q. From your knowledge of buying tires, was this a retail or wholesale transaction you had with Steepleton?

A. Well, I would consider in my case—I guess it would be—I don't think I bought them wholesale. The fact is, his recaps were around ten dollars each higher than the rest of the people in town. But I think that the difference would be in the type capping they got.

Q. Just give a better cap?

A. Well, they run better for me.

Mr. Burch: Run better for most people.

That is all.

**Redirect Examination,**

By Mr. Tincher:

Q. Just a minute, Mr. Phillips, I have one or two
192 further questions.

Then, if I understood you correctly, as far as you were concerned, the difference in price with reference to the recapped tire was a matter of quality?

A. Well, you got to figure this way. His tires were about thirty-five dollars roughly, for a recap, against in some cases here in town twenty-five. So you have got to take into consideration, if you are going to pay ten dollars more, I feel I get a good bit of service plus the fact I get a better cap, which I deducted against the—in other words, I am trying to say with him I got the service.

Mr. Tincher: Yes, sir.

A. (Continuing) Not disparaging to anyone, but, as I say, I am stating a fact.

Q. All right. With respect to the purchase of new tires from Steepleton, and in the year 1960, which Mr. Steepleton's records indicate something like fifteen hundred dollars worth of new tires?

A. Yes, sir.

Q. (Continuing) ——Sold to you during that year. Does that sound correct?

A. Yes, sir, I am sure that is correct.

Q. In connection with those new tires that you
193 bought, were you buying those tires at fleet discount?

A. Well, that I could not say because I have never been able to figure how they arrive at their prices.

Q. Did you——

A. (Continuing) In other words, I don't know what a fleet discount is. I don't know how they arrived at it, that is what I am saying.

Q. When you bought those tires, did you deal with one of Mr. Steepleton's outside salesmen?

A. Yes, sir.

Q. Who was that salesman in 1960?

A. I believe it was Mr. Nash.

Q. You believe it was Mr. Nash. In making the sales to you, did he discuss the basis on which he would arrive at the price you would be paying?

A. No, sir, he did not. He quoted me a price, including everything in the sales—the service man might call, and including all taxes.

What I mean is we normally—they say so many tens discount, two, three, four tens, whatever the discount means. But you can't tell anything by that. In other words, I want to get a pencil—I want to know how much do the tires cost me.

194 Q. You say ordinarily the salesman would approximate two tens—three tens off listed price.

Do you recall whether Mr. Steepleton's man did that in quoting the price of tires?

A. No, sir, he would tell me the tires cost so much, because, as I say, when they start talking tens—five or ten minutes before you get down to prices.

Q. In other words, you want the tire salesman to get precise when they figure the cost of a sale?

A. They might start, but then I would tell them to tell me how much it costs.

Q. When that was done and the various salesmen would end up with prices which indicated to you the cost to you of the particular tire, did you find that Steepleton General Tire was competitive in price with Firestone and others?

A. Well, very frankly, I think you will find that I did not, because I must have bought probably ten thousand dollars worth of tires, and is true I bought some fifteen hundred dollars worth from Steepleton.

But I would have to say at the time I bought the fifteen hundred dollars they are bound to have been competitive or I wouldn't have bought them.

But now frankly, I think they were higher, just like they were with caps. But still, he has got a good
195 tire, but still I think four or five of them has got good tires.

Q. During the course of 1960, did you buy any tires on behalf of the men who were operating the trucks you leased?

A. No, I did not. It may be in 1960 that a few times I may have sold one of the operators a tire. Maybe if he would come in at six o'clock in the afternoon and have kicked out a hole, I could sell him one of my tires. But that is only as a favor. If, in other words, I sold him a tire strictly what I paid for it, which he could go down town and buy it, but maybe late on Saturday and I have maybe from time to time sold maybe two percent of the tires that maybe I used. But normally I did not want to get involved in that.

Now, some of them bought from Steepleton but it was strictly on their own.

Q. All right. In those instances where they bought tires from you because of the time element involved, or something, would those drivers pay you for the tires?

A. Yes, sir.

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201 **JOHN K. WOOD,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. You are Mr. John K. Wood?

A. Yes, sir.

Q. Are you Manager of White Rose Industrial Laundry located here in Memphis?

A. Yes, sir.

Q. Were you holding that position in 1960?

A. Yes, sir.

Q. In the year 1960, did your company patronize Steepleton General Tire Company for tires and recapping service?

A. Yes, sir.

Q. And other car maintenance service?

A. Yes, sir.

Q. Will you explain the nature of the services and sales that were made to you by Steepleton Tire Company in that year?

A. Mr. Steepleton furnished us with part of our tires and service, they regularly inspected our local fleet, by repairs, recapping, and so on.

202 We have our own fleet maintenance, which consists of three mechanics. But in addition to that, Steepleton took care of all of our tire problems.

Q. All right. Now, in what territory——

A. (Continuing) Let me qualify that, please, sir.

All of our tire problems as far as recapping and servicing was concerned, and some new tires.

Q. Does that include removing the tires?

A. Yes, sir.

Q. (Continuing) ——that needed recapping?

A. Yes, sir.

Q. And installing other tires for use on the trucks?

A. Yes, sir. It was just left up to them.

Q. Then, in what territory outside of Tennessee did your fleet trucks operate in 1960?

A. Well, here is a little peculiar thing, that most of our fleets—we operate in portions of six states, as far away as three hundred fifty miles. And fifteen of our trucks are domiciled entirely away from here. We may see them once a year. And four operate out of here exclusively into—well, northern Mississippi and eastern Arkansas. And four others operate into that same area one day a week. So it is a little peculiar.

The balance of the trucks operate entirely locally in Tennessee.

203 Q. Will you tell us how many trucks your company was operating, approximately, in 1960?

A. I can't tell you exactly, because our fleet fluctuates from time to time, but have seventy-five cars and trucks at the present, and had that many at least in '60.

Q. Were those commercial vehicles used in business?

A. Yes, sir.

Q. Were you purchasing tires and tire servicing during the year '60 for all of those vehicles?

A. Yes, sir.

Q. At various times?

A. Yes, sir.

Mr. Tincher: You may question him.

**Cross-Examination,**

By Mr. Burch:

Q. Mr. Wood, is there competition in the tire business?

A. I would say it compares very favorably with the automobile business, you know, on prices.

Q. You don't go for any particular brand, you go for price and service, do you?

A. No, on occasion, such as recapping and that type work it is mainly service.

204 Q. You were in the courtroom and heard another witness testify he paid thirty-five dollars for a recap, and it is more than at most, because the service is better?

A. I did. And we pay Steepleton from fifteen to twenty-five percent more for servicing recaps than we can get it for elsewhere.

Q. You are referring to Steepleton.

A. Yes.

Q. Is this because of service?

A. We think their quality service and their quality caps is worth the difference.

Q. You don't buy recaps for resale, do you?

A. No.

Q. You use them up yourself?

A. Yes, sir.

Q. Something has been said in the course of somebody's testimony about price—I believe the preceding witness. Do you find that because you operate sixty-five vehicles that you necessarily——

Mr. Ray: Seventy-five.

Q. (Continuing) ——seventy-five—Mr. Ray has corrected me—that you necessarily get a better price than an individual on purchasing new tires?

205 A. No. I can elaborate just a minute.

Mr. Tincher: Yes, sir.

A. (Continuing) People are always asking me—several years now—I had been with the business thirteen years, in the capacity of Manager twelve—like to do friends a favor. And sometimes a friend—try to get a friend a tire wholesale, and find he could go to Sears-Roebuck and get it as cheap as I can.

I don't think there are any tire prices, don't believe we

are buying wholesale. If there is any wholesale, I don't know.

Q. If there is any great big volume discount, you are not getting it for seventy-five trucks, are you?

A. No, sir.

Mr. Burch: That is all.

**Redirect Examination,**

By Mr. Tincher:

Q. In that connection, Mr. Wood, in dealing with tire salesmen have you seen that the salesman will quote discount, say on multiples of ten off from this price?

A. They don't come in too often with that, frankly. I may be a sort of peculiar person but after I get
206 to doing business with a man just over a period of years, I usually get to the point I don't even listen to anybody any more. If he has got something I am satisfied with, and if a salesman comes in to us—and again, I don't want to be disrespectful to the tire salesman and the companies here, either—and I am satisfied with where I am buying tires and probably won't be making any change from Mr. Steepleton to service that is lousy.

Q. In purchasing tires, are you buying at what is known in the truck trade as fleet discount prices?

A. I doubt if I could even answer it. We don't check prices with the Steepleton salesmen, don't find what this tire costs in St. Louis. If we need tires, order tires once or twice a year, maybe check other tire companies to see if we are getting the price. If we would say, "Fine, we will buy Steepleton's," and I will discuss it occasionally with my fleet superintendent, and we both feel it is worth the difference.

That is the best I can answer.

Q. The difference is for the service?

A. They are generally a little higher all the way through. They are generally a little higher on tires, they are generally a little higher on capping.

Q. Do you feel that is accounted for there by the
207 difference in quality and additional service that is provided in connection with the maintenance of the tire?

A. We think it is definitely accounted for in so far as services is concerned.

You could argue the point whether those tires are worth any more than Firestone or Goodyear, and really couldn't answer it.

Talk about cost—when you got seventy-five different trucks you have got seventy-five drivers. No driver will drive a truck in the same manner. But whether you are going to get five thousand miles on one, ten thousand on another—by different men.

So it would be hard to say if the tires are worth more, don't you see.

Q. If I understood correctly, you testified you could not say whether tires were bought at wholesale.

Now, I would like to ask you whether you are in position to say from your mode of buying tires over the years that you are buying them at retail.

A. We are not buying them at retail.

Q. Would you explain what you mean by that?

A. Well, tire dealers have—I was in the tire business many, many years ago—they have what is called
208 list price, which is like you go down and buy a car—a sheet of paper there we would call list price.

But doesn't anybody pay list price. I bought a car the other day nine hundred dollars off list price. So what is list price? They don't mean anything either.

Q. But your answer, with reference to the purchase of new tires, is, as I understand it, "We do not buy them at retail"?

A. We don't pay manufacturers published list price for them, don't think anybody does.

Q. Do you also buy accessories and parts for your various trucks?

A. Yes, sir.

Q. Do you know whether in purchases of parts you buy at wholesale or at retail, or some other classification?

A. Well, we get invoices for people like Standard Parts —I believe I am correct—you know, you look at these things every month, and the first thing you know you are not even seeing them. I think there is only one price —sort of price. Whether wholesale or retail, I don't know. It is wholesale, I guess, because I don't believe Standard Parts could operate if not competitive there with Mills-Morris and other companies. We are getting some kind of discount on parts, of course.

209 In operation of the business, do you find that on supplies in the business you use in day to day normal business that you are able to buy them at discounts from retail prices?

A. Yes, sir.

Q. Would that be with reference to all your supplies, your tires, your parts and other supplies that you use in the business?

A. I suppose it would.

Mr. Tincher: That is all.

**Recross-Examination,**

By Mr. Burch:

Q. Mr. Wood, you would not say, from your experience, would you, the fact that you receive a discount makes the transaction a wholesale transaction?

A. I don't know. Someone would have to qualify to me what is wholesale—retail—before I could answer. So

that—only thing I could go by is comparison between one company and another.

Q. Suppose you do a lot of shooting and bought a lot of shotgun shells, used two or three cases a season, and you go in there and buy those shells and the fellow
210 says, "I will give you ten cents a box off."

You know that is still a retail transaction, but you got a discount?

A. Yes, sir.

Q. Of course, the wholesale transaction is the transaction of the man that bought them for resale from the distributor.

A. That is what I should think.

Q. That is what you normally think, isn't it?

A. Yes, sir.

Q. And the large users frequently get discounts, and good customers frequently get discounts, but they are still retail transactions, aren't they?

A. That is right.

Q. He has asked you about it. Wouldn't you say that generally the idea of purchasing for resale is what makes ordinarily a wholesale transaction as distinguished from retail?

A. I would think that if I were buying tires wholesale, what I would determine being wholesale, I would be buying direct from General Tire factory or Firestone Tire factory, and the middle man would not be there.

For example, Firestone dealers and Firestone stores will buy tires some place, but they will turn around and
211 sell the tire to me.

Q. Isn't it then that those items you get to conduct your service and the products you buy to use yourself—is that something usually associated with retail transactions?

A. Yes.

Q. For instance, if you go down and buy a carload of tires in some transaction, you would not expect them to send a carload truck out on the road.

A. I wouldn't get that, no, sir.

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212 **O. D. BLACK,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

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213 Q. Did your company have an arrangement whereby Steepleton Tire Company would send service men to check the vehicles regularly, or would they come only on call?

A. They generally checked them on the weekend without calling them, and then during the week they would come down when we called.

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215 **EDWIN W. ANDREWS,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. Will you state your name, please, sir?

A. Edwin W. Andrews.

Q. By whom are you employed, Mr. Andrews?

A. Klinke-Reed Dairy.

Q. In what capacity?

A. As Sales Manager.

Q. Did you hold that position in 1960?

A. About half of 1960.

*Testimony of Edwin W. Andrews*

Q. As Sales Manager, were you in position to know how many vehicles Klinke-Reed Dairy was operating in 1960?

A. About fifty.

Q. About fifty vehicles?

A. Yes, sir.

Q. Do you know throughout the year how many they were operating from other some other position you held with the company?

A. You mean all of 1960?

Mr. Tincher: Yes.

A. Be about the same all year, yes, sir.

216 Q. And did your company patronize Steepleton General Tire Company in 1960 for the purchase of new tires and recapping service and tire maintenance service?

A. We did.

Q. In what areas do those some fifty trucks of Klinke-Reed Dairy operate?

A. All of them operate in Shelby County except three that were in Arkansas.

Q. Did they cross back and forth between Tennessee and Arkansas?

A. Yes, sir.

Q. Did your company have an arrangement whereby the Steepleton Tire Company would send a service man with his truck on regular occasions to your place of business?

A. They were at our place of business about every day. Of course, they were usually on call, but they kept our fleet up, and normally they checked it I think on week-ends, too, but it was left up to them.

Q. Was the servicing arrangement similar to what you have heard testified to here before, namely that Steepleton's service man would remove tires that needed recap-

ping and repairing, and mount other tires on the wheels of your truck?

A. That is correct, yes, sir.

217 Mr. Tincher: That is all.

**Cross-Examination,**

By Mr. Burch:

Q. Mr. Andrews, have you got a television?

A. Yes, sir.

Q. And you know, if you are like most of us and go down to a television store and buy a television, you get a service warranty, when if it breaks down the man comes out and looks at it for you, does he not? Is that right?

A. Yes.

Q. But if you are like some more of us, me included, you get some friend to get you an in down at Orgill Brothers, and buy it wholesale, you don't get any service, do you?

A. That is normally correct, yes sir.

Q. You got a service warranty—you got the service on these tires, didn't you?

A. Yes, sir.

Mr. Burch: That is all.

**Redirect Examination,**

By Mr. Tincher:

Q. Did your company buy any tires, Mr. Andrews, as an accommodation for employees of the Klinke-Reed Dairy?

218 A. Not to my knowledge in 1960. I think we have maybe in past years, but not in '60, I don't think. Don't recall—I didn't, anyway.

Q. Could you state whether or not purchases of tires at Steepleton General Tire Company in 1960 were at fleet discount prices?

A. I couldn't answer that. I think it was at the fleet price. At least, I presumed it was at the fleet price, but as far as a fleet discount, no, sir, I don't know.

Q. Did you from time to time deal with other truck tire salesmen other than those from Steepleton Tire?

A. Toward the end of 1960 I bought tires elsewhere, yes, sir.

Q. And in dealing with these other tire salesmen, were you quoted fleet discount prices?

A. No, sir.

Q. Did you get any sort of discount in connection with the purchase of tires from Steepleton Tire Company?

A. Not to my knowledge. Now, the price was all set up before I came back, so far as I know.

Our prime purpose was the service with Steepleton.

Now, whether there was any discount on any invoice —I don't remember ever seeing that, no, sir, and I check those.

Q. In your purchases of tires, had the arrangement with reference to price and so forth been set up between
219 your company and Steepleton Tire Company before you were given responsibility for buying new tires?

A. Yes, sir, it had. In fact, we have been with Steepleton for many years. And one of the owners actually set it up—oh, back in 1940 or so, I am not sure just when —primarily due to service.

* * * * * * *

220 **WOODY HERRIN,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. Will you state your name and address, please, sir?

A. Woody Herrin, 362 Washington Street.

*Testimony of Woody Herrin*

Q. What business do you operate, Mr. Herrin?

A. Produce business, fruit and vegetables.

Q. Will you explain the territory you operate in and the nature of your operation?

A. Well, I pretty well operate nation-wide, all over the United States. I have trucks that haul produce from California, Florida, clear into Washington, practically every state of the Union.

Q. Are those over-the-road tractor-trailer trucks?

A. Yes, sir.

Q. Are any of them refrigerated?

A. All refrigerated, yes, sir.

Q. How many vehicles were you operating in the business in the year 1960?

A. You mean over-the-road trucks?

Q. All your vehicles in your produce business.

A. All vehicles—let's see. In the neighborhood—

221 delivery trucks and all, about twenty.

Q. All right. How many over-the-road trucks, Mr. Herrin?

A. Eight.

Q. Eight over-the-road trucks?

A. Yes, sir.

Q. Would delivery trucks be used transporting merchandise outside the State of Tennessee at any time?

A. Yes, occasionally we go over to Arkansas.

Q. Were you buying truck tires from Steepleton General Tire Company in 1960?

A. Yes, sir.

Q. Were you having truck tires recapped in that year?

A. Yes, sir.

Q. By Steepleton?

A. That's right.

Q. Did Mr. Steepleton have a service man that called at your place of business in connection with taking care of your tires?

A. Yes, sir.

Q. Was that done on a regular basis, or just when called?

A. No, regular.

Q. When and how often would they come?

A. Well, of course, I have a man that looks after my trucks. But if I remember right, a couple or three
222 times a week. In other words, they would try to come out when the trucks were in, you know from the west coast.

Q. By trucks being in, you mean some of those over-the-road trucks?

A. Right. They wouldn't all be in at the same time, see. You know, might be two today, two tomorrow—one today, three or four tomorrow, something like that.

But, when they are in there, servicing, see—see the tires, and if it needs recapping, or he always keeps the proper amount of air, what not.

Q. What would be the nature of the work done by Steepleton Tire Company service man with reference to your over-the-road vehicles, the ones that went in many different states, when they were at your place of business?

A. You mean the man that checked the trucks?

Q. Yes, the Steepleton employee.

A. Well, he would come in, check each tire to see whether or not they were satisfactory in every way, or see if the driver was keeping the proper amount of air, best of my knowledge, then to see also if the tire was needing recapping, or if it needed to be transferred from one wheel to another—transferred it around over the truck.

Q. Is that transfer from one wheel to another any
223 matching—mating?

A. Sir?

Q. Any matching or mating, is that what you call it?

A. That is right.

Q. Would that involve taking a tire off of one wheel and installing it on another wheel?

A. It would.

Q. That would be done by the Steepleton employee?

A. It would.

Q. If the tire needed to be taken off and recapped, did the employee remount another recapped tire on the wheel?

A. That is right.

Q. Did the Steepleton Tire Company do the recapping of your tires during that year?

A. Yes, sir.

Q. Did you also buy new truck tires from Steepleton in the year 1960?

A. Yes, sir.

Q. Would you state whether or not you were buying those tires at retail prices?

A. At retail, no. I was considered a fleet owner truck, and you have fleet owner discounts, and we would buy at fleet owner's discounts.

Mr. Tincher: Your witness, Mr. Burch.

224 **Cross-Examination,**

By Mr. Burch:

Q. Did you consider that you were buying at wholesale prices?

A. Wholesale, yes, sir.

Q. Because you got a discount?

A. Well, I would consider it that way.

Q. Did you buy any of them for resale?

A. No, sir.

Q. Do you consider that every item you get at a discount is what you call getting wholesale?

A. State that again.

Q. Do you consider that every item that you get a discount on, you are getting wholesale?

A. Not necessarily, no.

Q. Well, what is the difference?

A. Well, maybe I misjudged that as wholesale. But the fleet owner—in the trucking business we get a discount. That could be retail with the discount.

Q. That is what we are coming to. That is what you got, isn't it?

A. I suppose that is what you could call it.

Q. Actually, you got a discount off——?

A. By being a fleet owner.

225 Q. That is right. But you never carried them in any wholesale operation?

A. Well, I never resell them.

Mr. Burch: Any of them?

A. No.

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226 **JOHN S. ROBILIO,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. Will you state your name, please, sir?

A. John S. Robilio.

Q. In what business are you engaged?

A. Food manufacturer, macaroni products.

Q. And are you the Robilio of Robilio and Cuneo?

A. Well, I am one of them. I have a brother that is interested in the business, that is Albert Robilio.

Q. At any rate, you are part owner of the business?

A. Yes, sir.

Q. In manufacturing food products?

A. Yes, sir.

Q. Does the company operate any trucks or commercial vehicles in that business?

A. The only trucks we operate are our trucks.

Q. How many?

A. For our own deliveries.

Q. How many vehicles are there, Mr. Robilio?

A. At the present I would say about eighteen, off hand.

Q. And do you know approximately how many the
227 company was operating in the year 1960?

A. Approximately twenty-three.

Q. And those—would those all be delivery type trucks?

A. Yes, sir.

Q. Any over-the-road tractor-trailers?

A. No, sir.

Q. Combinations?

A. No, sir.

Q. In what area do your delivery trucks operate?

A. Well, we operate a few of those trucks within a radius of about a hundred and seventy-five miles of Memphis, delivering our own merchandise.

Q. Yes, sir. Would that include Mississippi, Arkansas, and Missouri?

A. Yes, sir.

Q. And was that true within the year 1960?

A. Yes, sir.

Q. During that year, did you buy any truck tires from Steepleton General Tire Company?

A. Yes, sir.

Q. Did you have recapping done by Steepleton?

A. Yes, sir.

Q. In your operation, did Steepleton Tire Company
228 send a service man regularly to your terminal to look after the tire repairs and service?

A. My trucks were checked, because they were not all in the city at one time, and I requested that service.

Q. Yes, sir. And how often would he have a man there without such call?

A. Well, off hand I would think they checked them once a week, or every two weeks, that is, on weekends when we had our equipment in the city.

Q. Yes. And did that checking involve the removal of tires that needed recapping and the installing or mounting of other tires on the wheels?

A. Steepleton Tire Company had orders from me if there was any equipment on any trucks that were a hazard, to remove it.

Q. Yes, sir. And his company did the recapping of your tires to be used again on your vehicles?

A. Yes, sir.

Q. All right. In your purchases of new tires for your vehicles, Mr. Robilio, would you state whether or not you were buying those tires at retail?

A. I was buying them on the fleet owner's price.

Q. Do you know whether or not that involved discounts from the retail price?

229 A. Well, I would imagine that that was a discount from the retail price because of the volume of tires we were using.

Mr. Tincher: I believe that is all.

**Cross-Examination,**

By Mr. Burch:

Q. You are a manufacturer who is on quite a large scale, are you not?

A. Sir?

Q. I say you are a manufacturer yourself, and on quite a large scale, are you?

A. Well, we are manufacturers. I don't know how large we are, or not.

Q. Well, in the spaghetti business you are big, one of the biggest in the country.

Now, you properly made the distinction between a discount off of retail—discount off of retail is not necessarily wholesale, is it?

A. I would think so.

Q. You would or would not?

A. Here is one thing. I am going to take it from a car standpoint. If a guy is going to buy one car, be one price. But if he is going to buy a volume, it is my
230 experience any company would give me a fleet owner's discount.

Q. You might say, if you know, then, the greater the customer, the greater you are going to get off. You are going to consider a customer—we will call it a boat—one boat—another boat—three of those here in the last week, going to call him a good customer, he goes into the store and is going to get ten dollars off.

That discount does not make it wholesale, does it?

A. No, not absolutely.

Q. Here is a discount off of retail, isn't it?

A. I would imagine.

Q. Actually, the more you think about it—I know you are not primed for these questions and did not come up here as an expert on this—just want you to think about it as we go along.

Isn't this what the distinction in wholesale is:

Wholesale is a person who holds for resale, sells for resale.

A. I understand, then.

Q. That is really what it is, isn't it?

A. Yes.

Q. In other words, where you get a discount off, as, for instance, if I am good user of shotgun shells
231 and a fellow gives me fifteen cents off, that does not make me a wholesaler, or a wholesale transaction, did it?

A. I wouldn't think so.

Mr. Burch: Thank you.

**Redirect Examination,**

By Mr. Tincher:

Q. Just a minute, please, sir.

A. Yes.

Q. Mr. Burch has asked you about some questions there with regard to something you might purchase at discount for your own personal use.

Now, do you understand that there are situations where you buy merchandise, not for resale, but for use, in a business where those purchases was—were wholesale purchases?

A. I didn't get that clearly.

* * * * * * *

232 Q. Are there any supplies or materials or equipment which you use in your manufacturing business which you do not resell, but which you purchase at wholesale prices?

A. I do not operate the plant. My job is in the shipping department only.

Q. Yes, sir. But from your part ownership in the business are you aware that certain supplies and equipment are bought at wholesale prices for use in the business?

A. Well, if you go into flour, buying at manufacturer's cost, and just like I say, I am not familiar with any part of my business that is in the production. We do not conflict in one another's jobs.

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233 **WARNER SWETT,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. You are Mr. Warner Swett?

A. Yes, sir.

Q. By what company are you employed?

A. With Central States Dredging Company.

Mr. Mitchell: Will you repeat it, please?

A. Central States Dredging Company.

Mr. Mitchell: Thank you.

Q. Please speak loud so that counsel can hear, and the reporter.

What position do you hold with that company, Mr. Swett.

A. I am the Office Manager and Purchasing Agent.

Q. Did you have that position in the year 1960?

A. I did.

Q. Do you know how many vehicles the Central States Dredging Company was operating in the year 1960?

A. Yes, sir, fourteen.

Q. What type of vehicles were they?

A. We had four Mack dump trucks, seven pick-up half tons, and three cars or automobiles.

234 Q. All right. In your position as Purchasing Agent, did you buy tires and recapping services for those vehicles in 1960?

A. I did.

Q. During that year did you purchase tires and recapping of tires, maintenance service, from Steepleton General Tire Company?

A. Yes.

Q. With reference to all the vehicles operated by the company?

A. Yes, sir.

Q. Where do those vehicles operate with reference to within the State of Tennessee or outside the State of Tennessee?

A. The four Macks operate on Government mat forms, Capes Landing, Missouri, Helena, Arkansas, and Richardson Landing, Tennessee.

The pick-ups are used in dredging—dredging out of Columbia, Kentucky, and all the various bases through Mississippi, and Helena, Arkansas, to about Island 62. The pick-ups are used to go from the dredge to the unloading operation.

Q. Do you transport gravel and other materials that have been hauled on the Mississippi River?

235 A. The Mack dump trucks do a sand and gravel operation.

Q. Do the pick-up trucks interchangeably do dredging and hauling outside the State of Tennessee?

A. For supplies and things like that, they do operate the highways of Arkansas, Mississippi, Tennessee, Missouri, and Kentucky.

Q. Did Steepleton Tire Company in 1960 provide service and send a service man to your place of business to check the tires?

A. Yes, sir.

Q. Did that service involve the removing of tires from your vehicles and installing and mounting of other tires from the vehicles?

A. Yes.

Q. As Purchasing Agent, would you explain the basis upon which you bought new tires from Steepleton Tire Company?

A. I don't know the price structure, but I imagine it would be commercial rate.

Q. Do you know from your dealings with various tire

salesmen how the transactions are handled with reference to fleet owners, fleet purchasers or discounts or other terms that are applied to that type of purchase?

A. No, sir, I wouldn't know that. We have traded
236 with Steepleton for so long that I don't know their price structure or any other tire company.

Q. Well, as Purchasing Agent, would you know whether you were buying at retail or not at retail with reference to the truck tires?

A. I think we would be buying below retail.

* * * * * * *

237 **A. L. BENNING,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. Will you state your name, please, sir?

A. A. L. Benning, B-e-n-n-i-n-g.

Q. By whom are you employed, Mr. Benning?

A. Transports, Incorporated.

Q. In what capacity?

A. A bus line.

Q. Pardon?

A. Bus line. I am Superintendent.

Q. Superintendent of Transports, Incorporated, which operates a bus line?

A. That is right.

Q. Did you have that position in the year 1960?

A. Yes, sir.

Q. Approximately how many vehicles were the Transports, Incorporated, operating in the year 1960?

A. Fourteen.

Q. Did those vehicles travel outside the State of Tennessee?

A. No, sir.

238 Q. From what point to what point did they operate?

A. From Memphis to Millington, Memphis to Shelby Forest, Memphis to various places.

Q. Were all those fourteen vehicles passenger vehicles?

A. Yes, sir.

Q. In the course of operation, did you transport passengers who were going from places in Tennessee to places outside of Tennessee?

A. Now, that I couldn't tell you. We bring them in to the bus terminal, and where they go from there I don't know.

Q. During the year 1960, did you buy any truck tires from Steepleton General Tire Company?

A. We did.

Q. Would you state the approximate quantity, if you recall them, in dollar volume or number of tires, that you bought in that year?

A. Oh, I couldn't. I imagine we usually run an average of three hundred dollars a month.

Q. Are those all bus tires?

A. Yes, sir.

Q. Would you state whether or not in your purchases of bus tires in 1960 you were buying from Steepleton Tire Company at fleet discount?

A. At fleet discount.

239 Q. That was the basis on which you made your purchases?

A. Yes, sir.

Mr. Tincher: I believe that is all.

**Cross-Examination,**

By Mr. Burch:

Q. You bought none for resale, did you, Mr. Benning.

A. No, sir.

* * * * * * * *

244 **JAMES H. MICKLISH,**

upon resuming the stand, testified further, as follows:

**Redirect Examination (Further),**

By Mr. Tincher:

Q. Mr. Micklish, at the close of the day yesterday when you were on the witness stand, you had been asked by Mr. Mitchell whether you had total figures reflecting sales by Steepleton Tire Company to the City of Memphis.

Do you now have those totals?

A. Yes, sir. I did not at that time but I do now.

Q. And from what information or exhibits in the case did you arrive at the totals?

A. I have forgotten the exhibit number. It is that one indicating the sales to fleet accounts.

Q. Perhaps it would be well for you to identify the exhibit from which you took the totals.

A. Exhibit 4.

Q. All right. And what is the total of sales of new tires by Steepleton Tire Company to the City of Memphis in 1960?

A. $9,289.00.

Q. Now, were those sales which, according to the information you have been given, were made pursuant to formal bids?

A. Yes, sir.

Q. Did you, from the transcriptions that have been
245 identified and those that have been introduced in evidence, make a further study and break down to show that total sales of new tires by Steepleton Tire Company in the year 1960 to various other governmental units?

A. Yes, sir.

Q. Do those governmental units include various counties as well as sales to the State of Tennessee?

A. Yes.

Q. All right, any other types of governmental units that have not been specifically mentioned?

A. Yes, one sale to the—one or two sales to the United States Post Office.

Q. All right. Would you give the—or state first where in your transcriptions you took the information from which you arrived at that total?

Mr. Burch: Now, is there any suggestion in the arrangement of these questions that these sales were pursuant to bid?

Q. Mr. Micklish, as far as you know, any information to indicate that they were pursuant to bid?

A. They appear in two exhibits. A part of them appear in the out-of-state exhibit, which is Exhibit number 1, due to the fact that they were out-of-state counties.
246 And the remainder of them appear in Exhibit number 4.

Q. Before we get the total with reference to those sales, what was your information as determined or as obtained from Mr. Steepleton with reference to prices charged to governmental units for their new tires bought from Steepleton?

A. That substantially all of the tires were sold on what is called a State list price which is a list that is lower—he has a list there lower than his cost of tires.

There were two or three counties which paid a little bit more, due to the fact that they received some extra service and I think delivery. But they were substantially all less than the price—the price of the tire was less than what Mr. Steepleton would pay for it.

Q. All right. Those to which services were performed for the county in connection with the sale of tires, were those explained by Mr. Steepleton as charges over and above State list price to take care of the services performed?

A. Yes, sir.

Q. What was the total for the year 1960 of these sales of new tires to governmental units other than the City of Memphis?

A. $47,159.00.

Q. Mr. Mitchell inquired of you yesterday with reference to percentages which you had prepared, total of sales made by Steepleton Tire Company in 1960 in
247 various categories, referring to the interpretative bulletin which has been made an exhibit—Exhibit number 6.

Have you since that time prepared such percentages which would not answer the question Mr. Mitchell asked you?

A. Yes, sir, I have done it in note form, but I have made no complete sales analysis.

Q. Before we proceed with putting your analysis in evidence, do you have a figure with reference to sales made by Steepleton Tire Company in 1960 to fleet accounts at wholesale prices?

A. Yes, sir.

* * * * * * *

250 Q. Do you have that figure among your notes, Mr. Micklish, or do we need a partial sales analysis?

A. No, sir, I have the figure.

The total sales which I accumulated for fleets which operated ten or more vehicles is $110,981.00.

From——

Q. How is—go ahead.

A. (Continuing) This includes sales of truck tires and tubes, which I understand it on Steepleton's records on the accounts receivables records were listed under the heading "General truck."

I deducted ten percent from this figure to take out the sale of any tubes which might have occurred in these transactions.

251 And I came up with a total figure of $99,833.00.

Q. Does that $99,883——

A. Eighty-three.

Q. Eight hundred eighty-three dollars?

A. Yes, sir, eight hundred eighty-three.

Q. Would you explain the basis on which you made the reduction of ten percent for truck tubes?

Did you make any examination or study of sales invoices to indicate whether that would remove any question of amounts being included on the total figure which should represent sales of truck tubes?

A. Yes, sir. In checking the invoices, there were many cases in which tubes were sold. In the majority of them that were sold in connection with prior sales and through observing of the records, it appears that ten percent will more than take care of any tubes which would appear on the invoices.

Q. Mr. Mitchell has handed you a sheet on which a breakdown appears to be made.

Will you explain what that is, now, with reference to the various totals that appear on that sheet?

A. Yes, sir. That is the categories that are—as previously testified, about listing categories and amounts involved. The first one is sales for resale. And

252 should I read the figures?

Q. Yes, go ahead and give the figures, and we will know what you are talking about.

A. Sales for resale, $58,395.00.

National account sales, General Tire & Rubber Company, $115,597.00.

And I don't have the cents on each one of these.

Sales of new truck tires to fleets known to have had ten or more vehicles in 1960, $110,981.00, with a deduction of ten percent, making that total $99,883.00.

Sales of new truck and passenger tires to Government—and those are sales at the State list prices—$47,159.00.

Q. Could we stop just a moment.

Does that cover sales to governmental units other than the sales to the City of Memphis?

A. Yes, sir, other than the City of Memphis. City of Memphis is the next category.

Mr. Tincher: All right.

A. (Continuing) Sales to the City of Memphis, new truck and passenger tires, $9,289.00.

And the last category is recapping to fleet accounts at less than retail, $21,959.00, for a total of $355,.73.00.

253 Mr. Tincher: All right, then may we have this sheet from which the witness has been reading marked as Plaintiff's Exhibit number 7.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 7, and same will be found among the exhibits in the cause.)

* * * * * * *

256 By Mr. Tincher.

Q. Mr. Micklish, from this Exhibit number 7, the figures of this exhibit, have you prepared any computations of percentages in the various categories, based upon gross sales made by Steepleton Tire Company in the year 1960?

* * * * * * *

258 Q. Have you prepared such percentages, Mr. Micklish?

A. Yes, sir.

Q. What figure did you use as the gross dollar volume of sales by Steepleton Tire Company in the year 1960?

A. I used the figure that was furnished by Mr. Steepleton in answer to interrogatories.

Q. Now, what figure was that, Mr. Micklish?

A. $903,520.56.

Q. And that was furnished in answer to interrogatory number six, which was gross income from sales and service during the year 1960?

A. Yes, sir.

Q. Did you use any other figure in arriving at percentages?

A. Yes.

Q. Just answer that question.

A. Yes, sir.

Q. What other figure, and from what source did you get the information that you used?

259 A. Again, it was from the—no, this was the national account figure which was furnished by the answer to the interrogatories.

Q. And what was the total figure in that answer?

A. I don't have that, sir. I have the two added, but I don't have that figure in my notes.

Mr. Mitchell: If that is Exhibit 7, the exhibit there——

Q. In response to interrogatory number eight, defendant's counsel furnished this information with reference to replacement of inventory value, plus commissions earned for delivery of new tires by defendant to national account customers of General Tire & Rubber Company by quarters during the 1960 year:

First quarter, $28,306.16.

Second quarter, $43,809.70.

Third quarter, $29,490.25.

Fourth quarter, $11,318.02.

The total of which I am adding, is $112,924.13.

Is that last figure the one you used in arriving at percentages you had in your second percentage analysis?

A. Oh——

Q. Or did you use the national account sales of

260 $115,597.00 as reflected on Exhibit number 7?

A. Yes, sir, that last figure is the one I used. I was in error when I said that I used the other figure. The figure I used was $115,597, which is the total which was reflected by their monthly totals in the accounts receivables records.

Q. Is that the total that is shown by the transcriptions which you made a part of your testimony yesterday as Government exhibit?

A. Yes, sir.

Q. Now, if you will, will you state the percentage of total sales for each of the various categories?

Mr. Mitchell: Pardon me. I did not get the total for the gross dollar volume in sales.

Will you repeat it?

Q. What was the gross—total of gross dollar volume in sales by your second analysis, which included the sales and services plus the national account sales?

A. $1,019,117.56.

Q. Now, will you take the percentages which you derived in each of the categories shown by your Exhibit number 7, and then the total percentage of all those, using first the sales and service figure of $903,520.56 as supplied by the defendant in the interrogatories?

261 A. Sales for resale, 6.4 percent.

National account sales, 12.7 percent.

Sales to fleet accounts operating ten or more vehicles, 11.0 percent.

Sales to Government, excluding Memphis, 5.2 percent.

Sales to the City of Memphis pursuant to formal invitation to bid, 1.0 percent.

And recapping to fleets at less than the prevailing retail prices, 2.7 percent, for a total of 39 percent.

Q. Now, using the other total, which I would like for you to read again, state—including both the sales and services as the figure was supplied by the defendant in response to interrogatories, plus the national account sales—give us those percentages.

A. That total was $1,019,117.56.

Q. Percentage of this total in sales for resale.

A. 5.7 percent.

National account sales, 11.3 percent.

Sales to fleet accounts operating ten or more vehicles, 9.8 percent.

Sales to Government, 4.6 per cent.

Sales to the City of Memphis pursuant to formal invitation to bid, .9 percent.

262 Recapping to fleet accounts at less than the prevailing retail prices, 2.4 per cent, for a total of 34.7 percent.

Q. Would you, Mr. Micklish, from Exhibit 4—do you have the total showing the sales of new tires to various counties that were listed in the transcriptions on Exhibit 4?

A. Those that are listed only in Exhibit 4?

Q. Yes, do you have the totals?

A. No, sir, I have them totaled altogether, those listed in Exhibit 1 or Exhibit 4.

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**Recross-Examination,**

By Mr. Mitchell:

Q. Mr. Micklish, with respect to that point that Mr. Tincher just last mentioned, that is, in your accumulation of some $47,159.00 of what you call sales to governmental agencies at State list prices or something, you have extracted some of that total from what you have

263 previously offered as your Exhibit 1, and you have extracted another part of it from Exhibit 4, is that correct?

A. Yes, sir.

Q. Now, have you made an adjustment or can you tell me what the adjustment is to your Exhibit 1? That is, by what amount is your previous total for Exhibit 1 of some $86,850.00 reduced by this extraction of sales to government at what you say is the State list price?

A. It is not reduced, sir.

Q. Well, what is the effect or what is the amount of it? That is all I want to know.

A. Well, sir, the amount I don't know. But it has no effect on Exhibit 1 because Exhibit 1 refers basically to out-of-state sales.

Q. All right, sir. I shan't ask you to change what your opinion is on it. I am sorry. I meant—but what I meant is on that schedule Exhibit 1, what part of Exhibit 7 consists of sales to states and counties someplace that are also included at least in this eighty-six thousand odd dollar figure for Exhibit 1.

A. The only way I could give you that is to go through the exhibit and pick out the counties.

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266 Q. Well, would you mind going through and telling me what pages, sheets, or other identification on Exhibits 1 and 4 you used in making up this total?

A. Yes, sir.

Q. I am trying to ascertain where you got that figure or how it is derived.

Would you take the red pencil or something and put a star on the pages in your Exhibit 1 and Exhibit 4 that you think are pertinent to county sales at State list prices?

(Witness marks exhibit as requested.)

Q. Now, what method are you using to mark them, so the record will reflect what you are doing?

A. On Exhibit 1 I am placing a star or asterisk beside the sales of truck and passenger tires to government units.

Q. All right. And that would be there—what you will mark—what you will mark will be the items you took out of Exhibit 1 to go into this total sales at State list price, I think you testified, of $47,159.00?

A. Yes, sir.

Q. All right, mark them with red in pencil.

Mr. Tincher: Might I suggest, as the witness goes along, that he identify which state or county or city or governmental unit he is marking.

267 Mr. Mitchell: Well, the exhibit will speak for itself, but if he wants to read it out, there is no objection.

Mr. Tincher: That is what I thought may be helpful if he will read out those, the governmental customers.

A. Drainage District number 9, Osceola, Arkansas.

Marshall County Schools, Holly Springs, Mississippi.

Mississippi County Road Department, Blytheville, Arkansas.

Quitman County District number 1, Marks, Mississippi.

Quitman County District number 2, Marks, Mississippi.

Quitman County District number 4, Marks, Mississippi.

Quitman County District number 5, Marks, Mississippi.

Tallahatchie County Highway District number 5, Jackson, Mississippi.

Tipton County Highway Department, Covington, Tennessee.

Tishomingo County District number 1, Tishomingo County District number 2.

U. S. Post Office and Garage.

Q. All right, have you done it, sir?

A. Yes, sir.

Q. All right. Now, then, can you also take your Exhibit 4 and follow the same procedure, please, sir.

As I understood your testimony, you got a part of
268 the forty-seven thousand figure from entries in your Exhibit 1 and the balance from Exhibit 4.

A. Yes, sir.

Q. I believe Mr. Tincher wanted you to read those out, Mr. Micklish.

A. Yes, sir.

Q. You may want to do it.

A. Dyer County Highway Department, Dyersburg, Tennessee.

Chester County Highway Department, Henderson, Tennessee.

Fayette County Highway Department, Somerville, Tennessee.

Gibson County Highway Department, Trenton, Tennessee.

Lauderdale County Highway Department, Ripley, Tennessee.

Obion County Equipment Garage, Union City, Tennessee.

Shelby County Board of Education, Shelby County Sheriff's Office, State of Tennessee Highway Garage, and State of Tennessee Department of Purchasing.

Weakley County Highway Department, Dresden, Tennessee.

That is all.

Q. All right. And you have also marked those with a red pencil or asterisk, or some indication to identify what particular counts out of your exhibit 4 you used in accumulation of the forty-seven thousand dollar figure of sales at State list prices?

A. Yes, sir.

269 Q. All right. Now, then, follow me. I believe I understand what you were trying to do.

Do you have your Exhibit 6 there, the January 1960 interpretative bulletin, available to you.

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271 Q. All right, Mr. Micklish, you have that.

Now, then, please, sir, if you will turn to page 33, the very low bottom of the left column of that page, paragraph number 2 relates to sales made pursuant to a formal invitation to bid.

As I understand it, your testimony is that there is but

one category of such sales that is pursuant to bid, they were made to the City of Memphis exclusively, and they total, according to your calculation, some $9,281.00, is that correct?

A. That is the only one that I have used, yes, sir. There is a possibility that there are others, but that is the only one I have used.

Q. Yes, sir. That is pursuant to bid, and that is under paragraph 2?

A. Yes, sir.

Q. Now, then, what you have done is go through and pull county or other governmental agencies as the customers of Steepleton and set up some forty-seven thousand odd dollars of that kind of sale that you say it is based on State list prices.

Actually, with regard to that, you are proceeding
272 under paragraph 4, are you not, on the connotation of probably several vehicles at some price less than the prevailing or wholesale, or whatever price is, on paragraph 4?

A. That is correct, sir. I am applying paragraph 4 to this.

Q. Now, then, what did you do about going out to the several customers whose names you read off and which you have marked now in your Exhibit 1 and your Exhibit 4, to determine how many vehicles they had, whether or not they were buying tires for them, whether he owned ten, or less than ten, or what the circumstances were about exactly how many vehicles there are, that the various counties of governmental agencies had or operated and bought tires for during '60, in order to fit the classifications that you have imposed on there for the purposes of your one entry, at least, in your Exhibit 7?

A. Nothing.

* * * * * * *

Q. Did you or not have familiarity with whether
273 or not recapping is done for these governmental customers at something different than the prevailing to anybody else recapping price?

A. No, sir.

Q. Do you know the amount of recapping or other services income represented by your figure of some forty-seven thousand dollars in sales to these customers of a governmental type?

A. There is no recapping included in that. That includes only sale of truck tires or purchase of tires.

Q. You are sure none of the figures you have indicated reflect any recapping and service income?

A. There was certainly recapping and service work performed for the county, but that figure there includes only the sales of truck tires and passenger new tires—new truck tires, new passenger tires.

Q. You got this from accounts receivable. As I understand, that is where you got the figure. That is where you got your entries, didn't you, your Exhibit 1 and probably Exhibit 4?

A. Yes.

Q. And you pulled out—took out all recapping or service income?

274 A. It is broken down in accounts receivable.

Q. As a matter of fact, is recapping done at anything other than prevailing prices for the customers, whether or not they are state, county, or governmental units, Mr. Micklish, by defendant Steepleton?

A. It is substantially the same, with the exceptions that I noted yesterday.

Q. Yes, sir. That will be the several sheets you accumulated in Exhibit 4, I believe it is, on which—is that not where you have accumulated what you say are recaps at something other than the prevailing rate?

Mr. Tincher: I believe that is Exhibit 5.

Mr. Mitchell: That is Exhibit 5. Thank you for the correction.

A. Yes, sir, that is Exhibit 5.

Q. And governmental agencies do not appear as the segregated accounts in the four parts of that exhibit, do they?

A. No, sir.

Q. And recapping done for counties or school boards, or whatever else, is at prevailing or everybody else's price by Steepleton?

A. Yes, sir.

Q. All right. Actually, there is no mention made in this interpretative bulletin that you found in your
275 preparation of this case—there is no mention made of any governmental sales except those pursuant to a formal invitation to bid?

A. I think that is the only mention of them, yes, sir.

Q. And your interpolation or your broadening of the exhibit in the course of paragraph 4 to include governmental sales is something that is not expressed in this, which is simply your adaptation or interpretation of paragraph 4.

Then when I say "you all," I obviously mean your department?

A. Yes, sir.

Q. Your immediate associates?

A. Yes, sir.

Q. In the Labor Department?

A. Yes, sir.

Q. Now, then, you have indicated with regard to the total gross sales, gross receipts of sales and services, that you used the figure of $903,520.56, which you derived from information I informally furnished Mr. Tincher's use, however he wanted to use it, in answer to interrogatory

number 8, breaking down income I imagine by counties, I am not sure.

But anyway, you got it from some information I furnished, as customary, in answer to interrogatories?

A. Yes.

276 Q. And this is what you relied on?

A. Yes.

Q. This was in lieu of whatever you found of your own knowledge on three different occasions in making audits of defendant's records and place of business?

A. Yes, sir.

Q. This was also independent of whatever you found when you went out there I believe the second, and I know the third time, and had access to their profit and loss statements for more than one period, tax returns for more than one period, and of course their entire set of accounts?

A. Yes, sir. This is the figure I used.

Q. In lieu of whatever you found, you used the figure that comes from me. But you did not use it in regard to national accounts.

Now, I want to read what I have to say in that same informal furnishing in lieu of answer to interrogatories of Mr. Tincher about national accounts:

"The defendant makes no sales to national account customers.

Replacement of inventory values, plus commissions earned for delivery of new tires by defendant to national account customers of General Tire & Rubber Com-

277 pany by quarters during 1960 were:

"First quarter—$28,306.16.

"Second quarter—$43,809.70.

"Third quarter—$29,490.25.

"Fourth quarter—$11,318.02.

"No deliveries of recapped tires were so made."

Now, is there anything, based on your three audits,

that is at variance with my statement that the national account income includes both the replacement of inventory values, plus some commissions on the books of Steepleton Tire Company?

A. Sir, it is not my understanding that those are replacements of inventory value, but rather a credit on Mr. Steepleton's accounts with——

Q. All right. If you won't accept the term "replacement of inventory," in lieu of it, is it on actual observation, based on your audit, an adjustment of purchase accounts?

And I think the two are the same, but we won't argue the actual fine points with you.

I don't know that much about accounting. I think when you adjust the purchases—the purchasers account in the business from the supplier, it is the same as
278 inventory adjustment. But about that I may be wrong.

Is it correct or not correct?

A. Well, certainly Mr. Steepleton's account is adjusted when this transaction takes place, but I think it is more involved than that.

Q. I am asking whether or not this figure that you have—you haven't used my figure from the interrogatories—you did for gross sales and services but did not for national accounts, did you?

A. Yes, sir.

Q. You did not?

A. No.

Q. Did you select it from the interrogatories or select it somewhere else? Where did you get the one hundred and fifteen? Do you remember that?

A. For national account sales.

Mr. Mitchell: Yes.

A. Yes, sir, from Mr. Steepleton, the national account receivables of it.

Q. You didn't on total sales, gross sales from the same location.

Why use one source on one part of the total, another source on another part of the total?

279 A. Well, because accounts receivable records certainly don't reflect all sales made by Steepleton General Tire Company, and it would——

Q. All right. In fact, they did not reflect any national accounts, did they? They are not in those records, they are not on the profit and loss statements, they are not in his tax return, are they—national accounts?

A. National account, yes, sir.

Q. National accounts?

A. The national accounts appeared in the accounts receivable ledger.

Q. I asked you about the P & L statements and his tax returns.

They have got a separate ledger he kept for memorandums purposes?

A. No, sir. These national account sales were not shown in his profit and loss statements, sir.

Q. All right. And they are kept separate in the accounts receivable, they are on them on a memorandum basis, a month to month basis, with General Tire Company. They don't go over into the profit and loss statement as such, and they don't show up on the company's tax returns as ordinary sales income?

280 A. That is correct.

Q. And I take it here the figure of some one hundred thirteen thousand dollars is because that would have come from my informal answers to interrogs, and this one hundred fifteen you used—a big part of that is actually adjustment of inventory values and adjustments to purchases accounts, is it not?

A. No, they are all national account sales.

Q. Yes, sir. But national account actually is made up of two items, one is the adjustment in cost that Steepleton has in his inventory, delivered to a customer of General Tire Company, that is the bulk of it, plus commissions, maybe five, maybe seven, at variable percentage, which he gets from having this storage delivery.

To make it clear, sometimes he installs a tire on a wheel, whatever else he might do, for a general customer.

So, out of this one hundred fifteen thousand, with there being some prearranged figure, between five and seven percent, is inventory adjustment, it is not income at all, it is simply their bookkeeping entry. Is that not so?

A. Their bookkeeping.

Q. Nothing more than a bookkeeping entry, it is simply a substitution of the inventory which Mr. Steepleton has delivered to a customer of the national manufacturer.

281

A. Not substitution of inventory, but giving a credit.

Q. Or replacement of inventory is the way I think of it. And I think that is the clearest, and having in mind that I don't know much accounting, in the first place.

A. Actually, it appears to me that it is a sale to General Tire & Rubber Company, for resale to their customers.

Q. It appears to you that it is what, Mr. Micklish?

A. A sale to General Tire & Rubber Company, delivered by Steepleton General Tire & Rubber Company for General Tire & Rubber Company.

Q. Let's just look at that.

Do you think it would make real good sense for General Tire manufacturer, with automobile tires or truck tires running out of their ears, to send one of those trucks here to Steepleton that is a retailer in order to buy a General from hir

A. No, sir, but it is——

Q. Be logical——?

A. (Continuing) It is an accommodation to their customer, I would think.

Q. Yes, but the customer is General Tire Company's customer. And the accommodation is done to the
282 customer of the home office of General Tire Company. And if you call it a national account, it is as to that category of customer.

A. Yes.

Q. And the accommodation rendered is from services by Steepleton, and he gets a commission for those services, and he also gets his inventory replaced—right? Or he gets credit against his purchase account?

A. Yes.

Q. And both inventory replacement or service income is included in that one hundred fifteen thousand dollars?

A. Yes, sir.

Q. It is also included in the one hundred thirteen which you did not choose to use?

A. Yes, sir.

Q. Now, you have come down and you have given some lists of sales, gross sales, percentage of sales.

And actually, do these—or what adjustment did you make for the federal and state sales tax on these sales?

A. None.

Q. You know the federal tax over the board runs ten percent on capping tires, and of course a three percent sales tax?

A. I don't know. I say what the percentage is on excise tax.

283 Q. Did you have recollection of becoming acquainted with a ten percent figure by reason of repeated examination of defendant's records?

A. No, sir.

Q. I am not sure about this, but I believe on page 33 of the interpretative bulletin that somewhere in there

there is a specific deduction to use there about sales—to make exclusions after getting the taxes structure.

I believe that is in there. I will ask whether or not it is. I am sure you are more familiar with it than I.

A. No, sir, as far as I know, it is not.

Q. You don't exclude federal excise taxes?

A. No.

Q. You don't exclude sales taxes, even though they are paid by the company?

A. No. I know of nothing in seven seventy-nine——

Mr. Mitchell: I won't take too much time, Mr. Burch.

Now, then, tell me on one of your figures which you have categorized as sales to fleet accounts, did you use wholesale—the first sheet, total dollar volume of sales

—sales of new truck tires to fleets known to have
284 ten or more vehicles in 1960, and come up with the net figure of approximately $99,800.00.

Now, those known to have ten or more vehicles is again based on your surmise or your own conversation you had with somebody, it is not based on observation, going out physically and counting or anything, or your personal investigation of the number of vehicles operated by the owners that you say operated more than ten.

A. That is correct, sir, with the exception of those who have testified.

Q. That is what I say. So I want to know how and where did you have that accumulation in this exhibit, that is, this number three, items on that exhibit you have, where is the backing supporting data for that figure?

A. I don't understand you.

Q. Let me pass this exhibit up.

I am referring to item three. And I want to know where the supporting data, in other words, the sub-totals shown on that, may be?

A. Oh.

Q. Do you understand what I asked you?

285 A. The figures from which these figures were taken appear in Exhibit 1 and Exhibit 4.

Q. All right, sir. Again, have you got those broken down?

A. I have a list of those.

Q. Fine. May I see it?

A. Yes, sir.

Q. Now, this sheet of paper you have handed me is your entry, is it not?

A. Yes, sir.

Q. It says fleet accounts, ten or more vehicles.

And do I understand that if we go through this Exhibit 4 and take the totals under the accounts, the names of which appear on this sheet that I now hold, we will end up with total sales of $110,981.00?

A. No, you have to go through Exhibit 4 and 1.

Mr. Mitchell: All right, sir.

A. (Continuing) Because there again it relates to out-of-state sales.

Mr. Mitchell: All right.

A. (Continuing) Your fleet accounts which were outside the State of Tennessee appear in Exhibit 1, rather than Exhibit 4.

Q. All right. So, instead of just going through

286 Exhibit 1, we go down Exhibits 1 and 4 that are already in evidence and pull the sheets of those exhibits that have these actual titles as headings, then we will end with $110,981.00?

A. If you add up the columns headed "general truck" and "other brands"—G. T. and O. B.

Q. You are just taking the totals of the page?

A. Each page—each column is totaled at the end of each page.

Q. You are taking page totals?

A. Well, one page, it is——

Q. What particular column do I have to take there, now?

A. Because that is referring to truck tires, not referring to recaps, used tires, or labor.

Q. Fine. Will you, how ever you can make that explanation—look up here at the very top of this thing and let's see if I may help you with it—list the account.

A. You want me to write those down?

Q. If you would. If it is not accurate, as I detect it——

A. All right.

Q. If not, you correct me.

List the accounts from Exhibits 1 and 4——

A. All right, sir.

Q. (Continuing) ——the making of that total,
287 $110,981.00 in sales of—now, to substantiate new truck tires, or whatever else it is that consists of sales of some account, some product, during 1960 again.

Now, would you read it back to me, then?

A. Listing of accounts from Exhibit 1 and 4, total $110,981, from sales of truck tires during '60——

Q. Thank you. Will you pass that to Miss Till and have it marked as Exhibit 8.

(Thereupon said document was accordingly marked as Defendant's Exhibit 8.)

Mr. Tincher: I understood that would be marked Defendant's Exhibit A, rather than 8.

Mr. Mitchell: Yes, I mean——

(Thereupon said document was accordingly marked Defendant's Exhibit A, and same will be found among the exhibits in the cause.)

Q. Now, then, some of these companies that are shown on this which has now been made Exhibit A to your testimony have already had representatives come in here and testify as to the number of vehicles during 1960.

Have you any knowledge or can you tell me what the total sales to those companies may have been out of the total of one hundred ten-odd thousand dollars
288 represented by all the accounts on this page?

A. No, sir.

Q. But I am correct in thinking I could get by going —for example, there has been somebody in from the Central States Dredging Company—going to either exhibit 1 or 4 in your exhibits and finding the account of Central States Dredging Company, and then taking the number of truck tires and determine by those—those representatively—for each witness the Government has called—from looking at the records of the customers, find out what part of the one hundred ten thousand dollars each customer in fact bought?

A. Yes, sir.

Q. Now, then, Mr. Micklish, I hand you what was originally Exhibit 12 in taking the second part of your deposition in this case, and I would like for you to either by reading it to be certain of it or from recollection, tell me what it is and what is there accumulated.

A. They are individual transactions to various customers.

Q. Any particular kind of transaction, sir?

A. These are indicating new—sale of new truck tires. They were taken for comparison purposes.

Q. And for what purpose had you originally prepared that which was known as Exhibit 12 to your deposition?

289 A. I intended to compare these prices with the prices charged the more repetitive and larger customers.

Q. Well, of the first few sheets of that exhibit containing listings that you made from the invoices alone as when you prepared that, were you looking at or were invoices alone available to you?

A. Yes, sir.

Q. So that when you prepared that exhibit you now hold, certainly the first few sheets of it, what you were doing was running down invoices and trying to establish which customers—that bought repeatedly and in larger quantity—were buying at some discount of better prices?

A. Yes, sir.

Q. From the tabulation—well, did those first few sheets refer to sales of products and sales of services such as recapping, retreading, and others?

A. These are new tires.

Q. New tires?

A. Yes, sir.

Q. Now, then, after that exhibit had been prepared, showing a lot of work at defendant's place of business, did you get into accounts receivable records more completely, rather than simply the invoices, and determine that some of the customers you had selected and whose names and accounts appear on that list were in fact not of the category you originally had thought, that is, that they were not in fact repetitive or larger volume purchasers from Steepleton?

290

A. Yes, sir. But that is tabulation actually from the invoices and at the time I did not have access to the receivables records.

Q. Yes, sir. Nevertheless, you determined that based on the invoices, and that is all you had gone through at the time you prepared the sheet?

A. I was comparing the price there. I was making a list by invoices on this thing. I was looking at the customer and looking at the price.

Q. All right. You may recall that in taking the deposition you went through and circled the invoice numbers there, and a lot of these names that are listed on those first several sheets of the exhibit—the data made by you

to indicate names of customers, they were in fact later determined not to be repetitive customers in substantial volume of products from defendant Steepleton.

A. Yes, sir.

Mr. Mitchell: Will you make that Exhibit B?

• • • • • • • •

292 **MILO J. ALBONETTI,**

having been first duly sworn, testified as follows:

**Direct Examination.**

By Mr. Tincher:

Q. Will you state your name, please, sir?

A. Milo J. Albonetti.

Q. By whom are you employed, Mr. Albonetti?

A. A. S. Barbaro, Incorporated.

Q. And what business is A. S. Barbaro, Incorporated, engaged in?

A. Wholesale beer distributor.

Q. Here in the City of Memphis?

A. Yes, sir.

Q. What is your position with the company?

A. Secretary.

Q. In that position, are you acquainted with the type of delivery vehicles that are operated by A. S. Barbaro?

A. That is right, yes sir.

Q. Do you know—or tell us what type you have in operation and had in operation during the year 1960.

A. Well, we have the two ton trucks, closed body. And we had two transport trucks that pick up beer at Belleville, Illinois, and bring it to our warehouse.

293 Q. Yes, sir. Two over-the-road transports?

A. Yes, sir.

Q. And how many of the two ton delivery type trucks did your company operate in 1960?

A. That is nine. And we had the station wagons—the advertising wagons—seven.

Q. Seven station wagons?

A. Yes, sir.

Q. Nine delivery—two ton delivery trucks?

A. Yes, sir.

Q. Plus two over-the-road trucks?

A. Yes. I have listed here I think seventeen trucks. But I know we had two over-the-road trucks at that time.

Q. Yes, sir. Then, were all those which you have described used in the operation of the business in 1960?

A. Yes, sir.

Q. Could you give us the total again of all types that you have described?

A. That would be eighteen.

Q. All right. Do any of those other than the two over-the-road transports regularly go to points outside of Tennessee, or are they strictly within the state?

A. No, sir, only in Memphis or Shelby County.

294 Q. All right. Did your company purchase tires and recapping service from Steepleton General Tire Company in 1960?

A. Yes, sir.

Q. Did the Steepleton send a service man to your place of business on a regular basis in that year?

A. Yes, sir.

Q. How often would he come?

A. They service the trucks once a week, only on special calls for punctures and other things.

Q. Would the servicing of the trucks once a week include those two over-the-road transport trucks?

A. Yes, sir.

Q. Did your company have recapping done on such tires—of the tires that were used on the over-the-road transport?

A. Possibly. We are kind of particular about our over-the-road trucks, and I think maybe once or twice we tried.

Q. But would it be true that as a general rule you would buy new tires for those trucks?

A. Yes, sir.

Q. In buying new tires from Steepleton Tire Company, would you state whether or not your company bought at retail prices or at some other prices?

A. No, we got a fleet discount.

295 Q. Would that be for trucks as well as the station wagons?

A. All trucks and station wagons.

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296 **B. E. MOODY,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. Will you state your name, please?

A. Ernest Moody.

Q. What company are you employed by, Mr. Moody?

A. Garrison Redi-Mix.

Q. Where is that company located?

297 A. West Memphis.

Q. What is your position with the company?

A. Plant Superintendent.

Q. Was your company in 1960 a customer of Steepleton General Tire Company for tires or recapping?

A. Well, I am sure it was. I can answer it for the last quarter. I was only there the last four months of 1960.

Q. All right. Do you know how many vehicles your company was operating in 1960?

A. Oh, approximately twenty.

Mr. Burch: If Your Honor please, I think we can greatly shorten this.

If all these witnesses that have been subpoenaed by the Government will stand up and be identified, I think we can stipulate as to what they will testify to.

* * * * * * * * *

298 Mr. Burch: Just call all their names there.

Mr. Tincher: Mr. Moody, who is on the stand testified he is from Readi-Mix——

Mr. Burch: Mr. Moody, how many vehicles do you operate?

A. Twenty.

Mr. Tincher: Yes.

(Witness excused)

The Court: All right, who is next?

Mr. Tincher: Mr. Walter Pitts.

Mr. Pitts: Walter Pitts Truck Company.

Mr. Burch: How many vehicles?

Mr. Pitts: About fifteen tractors, thirty trailers.

Mr. Burch: All right, another.

299 Mr. Tincher: William Millwood, Chapman Chemical Company.

Mr. Burch: How many vehicles?

Mr. Millwood. About twelve.

Mr. Burch: Thank you.

Mr. Tincher: C. E. Griffith of Gordons Transport Company.

Mr. Burch: I know he has got a lot of them.

Mr. Griffith: About one thousand.

Mr. Ray: That is out of Memphis, that is one thousand?

Mr. Griffith: Yes.

Mr. Tincher: Mr. C. C. Congdon of Weymouth Construction Company.

Mr. Burch: I know about that.

Mr. Tincher: One hundred and twenty-five, I take it?

Mr. Burch: He has got a lot.

Mr. Congdon: Yes, sir.

Mr. Tincher: Harry Engelberg of Engelberg Packing Company.

Mr. Burch: How many, Mr. Engelberg?

Mr. Engelberg: Eleven.

300 Mr. Burch: Eleven.

Mr. Tincher: Irene Manus.

Mrs. Manus: Yes, sir.

Mr. Tincher: Of Ray E. Carter.

Mrs. Manus: Ray Carter Heavy Hauling. We have about eighteen tractors and twenty trailers.

Mr. Burch: Who is that?

Mr. Bevel: Billy Bevel.

Mr. Burch: How many do you have?

Mr. Bevel: Eight.

Mr. Ray: Wait just a minute. Are you counting trucks, all trucks of the company, now?

Mr. Burch: Who is this?

Mr. Bevel: Billy Bevel.

Mr. Tincher: Your name——?

Mr. Hall: Hall, twenty-eight dump trucks, three stake bodies, four trailers, twelve motor graders, one car.

Mr. Burch: And did you buy tires for your graders from Steepleton?

Mr. Hall: Buy tires—trucks—I buy all tires, sir.

301 Steepleton bought our tire rebuilding work.

Mr. Tincher: Would you state your name?

Mr. Hall: Paul Hall, sir.

Mr. Tincher: Where are you from? What is your occupation?

Mr. Hall: Gibson County Highway Department at Trenton, Tennessee.

The Court: Now, is there anybody in the group that bought tires for resale or did you all buy them for use, or buy recaps on your vehicles?

Anybody buy them for resale?

(No answer)

Mr. Burch: Now, if Your Honor please, we will stipulate that each of these operators during the year 1960, with the exception of the two individuals whose names Miss Miriam has, purchased an amount of tires and servicing——

Mr. Tincher: We asked the same questions. He testified there—is the only one——

Mr. Burch: Well, who do you think should fairly be excluded?

Mr. Tincher: Only one.

302 The Court: Mr. Bevel said he had eight vehicles.

Mr. Burch: This other gentleman, Mr. Hall, did not have commercial vehicles. He had motor graders——

Mr. Tincher: The Gibson County Highway——

Mr. Burch: Mr. Hall, how many?

Mr. Hall: There are twelve motor graders.

Mr. Burch: How many trucks and automobiles?

Mr. Hall: One car, twenty-eight dump trucks, three pick-ups.

Mr. Burch: He is all right. He should not be excluded.

That all of them purchased tires or recaps, and their testimony would be substantially the same as the witnesses who testified this morning.

Now, there is only one witness I would like to interrogate, and that is the representative of Gordons. And there was one point I would like to ask him.

The Court: All right, do you want to read these names in there?

303 Mr. Burch: They are stipulated.

* * * * * * *

305 The Court: Do you want to get these names in the record or not?

Mr. Ray: After Exhibit 4 is put in, we won't need all the detailed names, will we?

No, we won't need that. I think it would just clutter up the record, if Your Honor please, unless Mr. Burch wants the names that are in the record in Exhibit 4 named, the names in this further—I don't believe——

The Court: Well, you are stipulating, then, the representatives from those companies are here or are available, and all these could—would testify substantially as the other witnesses, to the same facts and circumstances.

Mr. Ray: I assume that is right, each one.

Mr. Burch: Your Honor has stated it exactly as I said it a while ago.

306 The Court: All right.

Mr. Tincher: And that Exhibit 4 may now be received in evidence for whatever it is worth.

Mr. Burch: Well, I will stipulate that, for whatever it is worth. It may be received in evidence, yes.

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307 **C. E. GRIFFITH,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Burch:

Q. State your name, sir.

A. C. E. Griffith.

Q. Mr. Griffith, what is your connection with Gordons Transports?

A. Superintendent of drivers.

Q. For the record, Gordons Transports is one of the biggest trucking firms in this area, is it not?

A. That is right.

Q. And you have stated already, before you were sworn, that you operate about one thousand vehicles?

A. Through Memphis, yes.

Q. Now, the cost of a tire is a tremendous item in your business, isn't it?

A. That is right.

* * * * * * *

309 Q. Now, what are the considerations that cause you to buy tires from wherever you buy them?

A. Price is a big factor, competitive.

See, we buy nylon tires, rayon tires, other tires. And some tires we prefer to use on the front wheels of our equipment because it handles better—whatever kind of tires that are needed for your equipment.

Q. And all those various factors are things that influence your decision as to where to purchase tires from time to time?

A. Yes, sir.

* * * * * * *

310 **Cross-Examination,**

By Mr. Tincher:

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311 Q. All right. Now, in addition to what you termed reciprocity in the matter of your purchases of tires from different tire dealers, does the question of the discount which you get enter into your decision of whether to purchase the tires or not?

A. You are talking about discounts. I don't know, as far as the discount is concerned, I haven't heard that word used quite a while.

312 Q. What term is used in connection with fleet purchases of new tires?

A. It is—I don't know what they call it now. But when we go to buy tires, usually if we are going to buy off of five different companies, I get prices from five different companies, and they all vary a little bit from

time to time. And they would vary also on the type of tires you buy, whether you buy tires—half-tread or one hundred high level tires.

Q. Generally speaking, does Gordons Transports buy from the manufacturer rather than from dealers?

A. No, always gone through dealers.

Q. But do you know whether or not Gordons Transports has an arrangement with the manufacturer whereby they are billed from the General Tire Company or Firestone Tire Company home office rather than from the dealer's office?

A. No, General Tire is billed through Steepleton. Firestone is billed through Third and Washington.

Q. Here in Memphis?

A. Yes, sir.

Q. Well, my question that I still am trying to get an answer to, and perhaps I should be clear about, is:

Does your company in purchasing tires from Steepleton Tire Company or some other tire companies get
313 what is known in the trade as fleet discount prices?

Mr. Burch: If Your Honor please, he did get the answer. He just didn't like the answer.

He stated that for many years he hadn't seen anything about discounts, that he bought at prices—stated clearly that in the record.

The Court: Well, he has a right to interrogate him further about it, if that is the point.

Mr. Burch: If Your Honor please, I am not objecting to his further interrogation. But I do object to him telling the witness he did not answer the question, when he did answer the question.

The Court: Well, he did not answer directly, I don't believe.

He did have some explanation there.

Put it to him again and see if you get a direct answer.

He of course has the right to explain his answer.

Mr. Tincher: Yes, sir.

Q. State whether or not in your purchase of tires from Steepleton General Tire Company, Gordons Transport were given what is known in the trade as a fleet
314 discount price, or something comparable to that.

A. That word has been kicked around a lot. Now, I don't have a price list of Steepleton's, Firestone, or any other tire company. I don't have the price list that they put out. I don't have a price list from them. I ask them what I can buy a certain type tire for, what it will cost me. And I will ask three or four different companies on the type that I want. And then it has got to be pretty competitive before I place an order.

Q. Would you buy tires at the retail price to be used on Gordons Transports trucks?

A. At the retail price?

Mr. Tincher: Yes, sir.

A. I have no price—wouldn't even know what the retail price of the tire was, so far as the retail price is concerned.

Q. Well, would you say you buy the tires at something other than the retail price?

A. We buy the tires and use them ourselves. They are bought on a price based on competitive, is all that I can tell you. I don't know of any other way to explain it.

Mr. Tincher: That is all.

315 **Redirect Examination,**

By Mr. Burch:

Q. Mr. Griffith, it has been a very long time ago since people tried to sell you tires by saying, "Now, here, here is the tire at your posted price and I am going to give you a discount off that price"—that has been a long time since anybody has tried to sell you tires on that basis, hasn't it?

A. Quite a few years, yes, sir.

Q. Now they come to you and say, "Mr. Griffith, here is such and such a tire, and the price to you is so much"?

A. That's right.

Q. And you buy on that price without any discount off or anything, and you look at the fellow's price against the price that you could buy it somewhere else?

A. That is right, competitive.

* * * * * * * *

316 **JAMES H. MICKLISH,**

testified further as follows:

* * * * * * * *

326 **Redirect Examination,**

By Mr. Tincher:

Q. I hand you, Mr. Micklish, a set of sheets which contain the answers to interrogatories that were propounded by the plaintiff.

Are those the answers from which you took certain figures in your testimony this morning?

Mr. Mitchell: What is it you are handing him?

Mr. Tincher: Your answers to interrogatories.

Mr. Mitchell: Oh.

A. Yes, sir.

Q. And those are the answers which Mr. Mitchell, counsel for the defendant, said had been furnished to the Government attorney, for whatever use he wanted to make of them?

A. Yes, sir.

Mr. Tincher: I wish to offer those in evidence as Plaintiff's Exhibit number 8.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 8, and same will be found among the exhibits in the cause.)

Q. I hand you Plaintiff's Exhibit number 1, and as I recall your testimony earlier today, you read off the names of certain county government purchasers from
327 Exhibit number 1. You called the name of some county in Tennessee. Is that correct?

Will you look through and see whether that is correct?

A. From this exhibit sheet——?

Mr. Tincher: Yes.

A. From Exhibit number 1?

Q. Exhibit number 1. It is near the back, if I recall correctly.

To speed things up, following Mr. Burch's suggestion, what I have in mind is: Are there some sheets in that Exhibit number 1 which contain entries reflecting sales to more than one customer on the same sheet?

A. Yes, sir, they are, in an attempt to conserve space. And they I put several entries on one sheet. And in this Exhibit there will appear some companies or possibly some counties in the State of Tennessee. Those were certainly not taken into consideration in computing the amount of out-of-state business.

Q. All right. That was to be my question.

Then, if customers with addresses in the State of Tennessee are included among the sheets in that folder, were the amounts of sales to such customers omitted when you compiled your total of out-of-state sales to this company?
328 A. Yes, sir. In the last pages of the exhibit, excluding these monthly lists, only those underlined in red were included in determining the out-of-state totals.

Q. All right. Now Mr. Mitchell asked you to testify, and there I believe while you were on the witness stand, and marked with a red pencil entries that show those customers whom you considered in your tabulation.

If you inadvertently overlooked any of those and do

not have them marked for a customer in the category you were asked to mark, can they be otherwise identified on further examination of these two exhibits?

A. They have been identified by the name and address, yes, sir.

Q. Would that be some identification identifying the county or city governmental unit?

A. Yes, sir.

Q. Those transcription sheets have various symbols indicated, such as F. I., G. P., V. V., O. B., and perhaps others.

Where did those symbols come from, Mr. Micklish, in your preparation of these transcripts?

A. From the accounts receivable record. Those are the abbreviations used by the company.

328a Q. Did any official of the company explain to you what those abbreviations mean?

A. Yes, I think probably Mrs. Lauderdale did. At least, someone down there did.

Q. Now, try to recall, if you can, who it was and the circumstances under which the explanation was made, so that we will know whether you have correct information or not.

A. I am sure it came from Mrs. Lauderdale.

Q. Will you explain what these symbols mean, those that I called off that are on your transcription.

A. G. T. is the abbreviation for general truck or general truck tire; G. P. for general passenger; V. V. for vulcanizing, including recap; U. T. for used tire; and O. B. for other brands.

Q. Did you find any particular brand included that was identified by name under the other brands symbol?

A. Yes, sir, they sell Michelin tires under the O. B. entry.

Q. Mr. Mitchell inquired at some length about ledger

entries which you examined and transcribed with reference to the General Tire & Rubber Company transactions.

And I am handing you here a number of ledger sheets, and ask you whether those are ledger sheets which you examined in that respect.

329 A. They are.

Q. Do those sheets include all the ledger sheets for the year 1960 which were carried in the account of General Tire & Rubber Company?

A. In making examination—from making examination, it appears that this is all of them, yes, sir.

Q. Now, I wish to hand you here a number of other ledger cards which were pulled at random by Mrs. Lauderdale from Steepleton General Tire Company accounts receivable ledger, and ask you whether those represent sales as reflected by such ledger records for other customers of Steepleton Tire Company.

A. They do.

Q. Were the two groups of ledger cards filed in the same filing cabinet at the Steepleton Tire Company's place of business?

A. Yes, those of General Tire & Rubber Company were filed alphabetically with the rest of the cards, with all the other cards.

Mr. Tincher: Excuse me one moment.

(Counsel confer.)

Mr. Tincher: If Your Honor please, for the purpose of proof of the matter of the composition of the two

330 sets of ledger cards, we wish to offer them as evidence, with the understanding that defendants may substitute photostats of these.

And first, I will ask that the ledger sheets there for General Tire & Rubber Company be marked for identification as Plaintiff's Exhibit number 9.

(Thereupon said documents were accordingly marked

as Plaintiff's Exhibit 9, and same will be found among the exhibits in the cause.)

Mr. Tincher: Would you count the number of sheets, please?

(The sheets referred to were thereupon counted by the reporter.)

Mr. Tincher: The reporter has counted the number of sheets in Plaintiff's Exhibit number 9.

There are thirteen sheets from the ledger for General Tire & Rubber Company.

And we offer that as Plaintiff's Exhibit number 9.

The Court: All right, sir.

Mr. Tincher: And as Plaintiff's Exhibit number 10, a random selection of ledger cards totaling nine
331 in number for other customers of Steepleton Tire Company.

(Thereupon said documents were accordingly marked as Plaintiff's Exhibit 10, and same will be filed among the exhibits in the cause.)

Mr. Mitchell: What is that?

Mr. Tincher: Number 10 was nine ledger sheets, samples of other customers ledger cards.

Q. With reference to the General Tire & Rubber Company account, Mr. Mitchell asked you whether the account was adjusted with reference to Steepleton Tire Company's delivery of tires to various national account customers of Steepleton Tire Company.

Could you explain in what way the account was adjusted?

A. The only thing I saw concerning national accounts that—as far as I can recall—were account receivable ledger and invoice, and I did see the invoices of Steepleton General Tire from General Tire & Rubber Company, as they do in every national account transaction. I did not see any other records. Well, I did not see any of the

other records connected with the transaction. But on the accounts receivable records each month the account was credited up. How it was done, of course I don't know.

I did not see any documents explaining what or
332 how it was done.

Q. In brief, was the Steepleton Tire Company purchase account from General Tire & Rubber Company credited each month with the amount—the total amount of invoices made out during the month to General Tire & Rubber Company?

A. That is my understanding, sir, although I did not see a document showing that.

Q. Mr. Mitchell asked you whether you included federal excise and state sales taxes in the total dollar volume of sales.

Were those items, namely, federal excise tax and state sales tax, included in the accounts receivable ledger entries made by Steepleton Tire Company?

A. Yes, sir.

* * * * * * *

336 **Recross-Examination,**

By Mr. Mitchell:

Q. With respect to these ledger accounts, Mr. Micklish, you have just identified that came in from the defendant's records, I hand you a set of ledger accounts headed General Tire & Rubber Company, named your exhibit 9, and I ask you whether or not the names of particular customers that appear written there in pen and ink or pencil down about the third column of those ledger sheets—it may be the fourth, but anyway, near the right hand—identifies and is one of the only places in the defendant's books where the customer of General Tire Company who took delivery of the units reflected at those same places on those invoices is shown.

A. A customer is shown, yes, sir.

Q. And that customer's name indicates that they took delivery of whatever is written on the ledger at that place, and on the same date, is that not so?

A. It indicates that they were billed for that, or that the transaction took place. It does not show where they received the merchandise—took delivery of the merchandise.

Q. But it shows the transaction which was billed to General Tire Company on that ledger account took place with some customer there whose name is written opposite each item?

337 A. Yes, sir.

Q. And that is about the only place in defendant's records that the person or company that took delivery of the merchandise is shown?

A. Yes, sir.

Q. And that is different from every other ledger card in this sample which you have made Exhibit 10, or any other ledger card you saw at Steepleton General Tire Company—this puts it there, the different customers name for each item?

A. The others show no customers other than they are written at the top of the ledger card.

Q. The only other thing upon any other ledger card appears the same place, General Tire & Rubber Company —is that at the top of that, that is the top of your Exhibit 9?

A. Sir?

Q. The only thing—the only thing that appears at the top in the place that General Tire & Rubber Company appears on your Exhibit 9?

A. Yes, sir, other than the customers' names, the ledgers are substantially the same.

Q. Now, then, there was some question asked with regard to sales tax or this federal excise tax.

338 There is no federal excise tax or sales tax reflected in this tape with all transactions of Steepleton's books, is it? I don't mean to call on your memory.

A. I don't know.

Q. But you really don't know.

Is it in point of fact that he does not know the price at which the customers whose names are written in pen and ink on that Exhibit 9—that Steepleton does not know the price which that customer from General Tire Company obtained the merchandise shown on that ledger card?

A. Yes, sir, that is true.

Q. Now, he does not know it.

And of course, federal excise tax and state sales tax is based on the percentage of the value of the item sold, isn't it? Three percent State of Tennessee, and some—about ten percent for the federal excise tax, that is true, isn't it?

A. That is true.

Q. So, if he does not know one hundred percent, they could not possibly show any ten percent or any three percent, they simply don't know the information.

A. As I understand, the excise tax is not based on the price tax—the cost tax—but the amount of rubber in it.

339 Q. It is not based on a percentage of what the tires cost somebody?

A. No, as I understand it, it is based on the amount of rubber in the tire.

Q. All right. Could they impose sales tax, and we don't have the basic value at which the ultimate consumer got the product, which is three percent of a sale that is Tennessee sales tax?

A. No, sir.

Q. So that they could not have done so and they don't have the amount?

A. I think not.

Q. But Steepleton you know for a fact does not know the price at which any one of the customers actually paid for the tires shown on there.

A. That is right. That is right.

Mr. Mitchell: That is all, may it please the Court.

**Redirect Examination,**

By Mr. Tincher:

Q. Your answer to Mr. Mitchell referred to the information which was written out by Steepleton Tire Company to show delivery of tires to one of the national
340 account customers, is that correct?

A. Yes.

Q. Where the amount of that transaction was not shown in dollars and cents?

A. As I understand it, he was referring to the transaction with General Tire & Rubber Company.

Q. Then, as I take it, you understand—would you look at this transcription from the General Tire & Rubber Company invoice and see what you need to clarify the answer.

A. This is a transcript of one of the invoices I made, invoiced to General Tire & Rubber Company. I picked it up as being more or less typical of a national account transaction. The sales tax does not show on the invoice, but the excise tax is shown.

Q. Is there an entry there that relates to the three percent?

A. Yes, there is.

Q. Can you tell whether that is state sales tax or some other item which by coincidence was—by coincidence or otherwise was the same percentage as the state sales tax?

A. No. Actually, it is labeled S. A. The S—less three percent—S. A. I don't know what S. A. stands for.

Q. Look on this companion invoice relating to that
341 transaction, which I understand is to reflect the delivery of tires to Tri-State Mack Distributing Company, a companion invoice, and see whether that has the information with regard to the price of the merchandise delivered.

A. There is no price at all on the companion invoice.

Q. Has that been the type invoice you had in mind in answering Mr. Mitchell's questions with respect to not showing sales prices of the items delivered?

A. I understood that he was speaking of the price to the customer. If he was talking about something else, then I misunderstood him, if he was talking about the invoice to General Tire & Rubber Company, because certainly the price does appear on that.

Q. All right. And you have those sample transcriptions as a part of the Plaintiff's Exhibit number 3, which is already in evidence?

A. Yes.

* * * * * * *

350 **DEFENDANT'S PROOF.**

Thereupon the defendants, in support of the issues on their part, introduced evidence as follows:

**A. E. STEEPLETON,**

called as a witness in behalf of the defendants, and having previously been duly sworn, testified as follows:

**Direct Examination,**

By Mr. Burch:

Q. Mr. Steepleton, you have previously testified after being called by the Government, and I don't want to retrack what we went over there, but I do wish you to state rapidly and in a summary fashion what your experience in the tire business has been.

A. My first indoctrination in the tire business was with McDowell Tire Company as a commercial retail salesman in Kansas City in 1938.

In 1940 I transferred my employment from them to the General Tire & Rubber Company as a wholesale territory salesman.

And in 1944 I was sent to Memphis to manage the old Newsum Tire Company, which was at that time solely owned by General Tire & Rubber Company. They gave me the opportunity to buy stock in this company
351 out of profits earned and made me a contract that if I could operate it on a profitable basis that I could buy all the stock, which I subsequently acquired.

Q. You have been in the business since?

A. I have been in the business since.

Q. So your experience extends from 1938 over a considerable period or over a considerable area, and starting with the company level and down to the level where you are principally in merchandising, is that not right?

A. That is right.

Q. Now state whether or not in your particular business the type and quality of service that is rendered has anything to do whatever with the success or failure of your business.

I will have to ask you a lot of that type of question.

A. Yes.

Q. You will just have to be patient.

A. Well, we have approached this tire business on an entirely different angle from the average tire dealer, and specifically our competitors in Memphis. We have always believed that we can collect a little more money for a better product that is highly serviced.

Peculiar to the tire industry, a tire is one commodity that—particularly in the truck tire, we feel that
352 needs constant servicing from the time it is put on the wheel until it is discarded as junk. And

we have set out to render this type of service. But we were the first people in Memphis to equip a truck with air compressors, first to equip it with pneumatic wrenches. We have on our service vehicles there all new innovations that have been advanced to properly service this truck tire. So——

Q. Now——

A. (Continuing) ——in addition to that, radio to help expedite the service.

Q. When you use the word "service" that embraces service to the people who use the products, does it, principally?

A. Yes, sir.

Q. According to the testimony in this case, your customers, many of them are truck operators that operate for themselves all around the clock, every day, day and night, Sundays, holidays or Christmas, don't they?

A. Yes, sir. Our business necessarily requires that we are open approximately twelve hours a day through the regular week days, and then we are also obligated to render emergency services at night, Sundays, holidays, around the clock.

Q. And does that require not only that you render the service when it is called for, but you have a force
353 standing ready and willing to perhaps render it when it is called for.

A. That is right.

Q. Now, what was the result of your operations in your last fiscal year profit-wise?

A. The last year you are speaking of?

Q. Well, '60, if you happen to recall it. I am just turning to see——

A. Well, since the plaintiff subpoenaed out 1960 operating statement, I just looked at it this morning, and we had a net profit of twenty-four thousand dollars.

Q. Twenty-four thousand dollars after taxes?

A. Yes, sir.

Q. Now, if you voluntarily bought the suggestion of these gentlemen and elected to come under the Fair Labor Standards Act and pay them time and a half, on these records would you have a profit or loss?

A. Well, we would have certainly have had a loss, because this thing that these people are trying to impose on my little retail business would cost in the neighborhood of thirty or forty thousand dollars additional service wages.

Q. Now, you mentioned that you had retail—and that is one of the issues that I want to go into in your testimony.

From your long experience in the tire industry, do
354 you think you are qualified to tell us what the phrase "retail" means in that industry?

A. Well, I don't believe there is any question. There is no question in my mind, and I have never heard it disputed by anybody in the tire business but what a consumer sale is a retail sale.

Q. Now, by a consumer sale do you mean a sale to some person who is going to use and consume the product?

A. Yes, sir, regardless of the price, quantity, or any other factor.

Q. As far as you are advised, and after having gone through rather extensive preparation getting ready for this trial, do you know of anybody in the tire industry that has any other view?

A. I do not.

Q. Now, the Government has got some experts, and sitting in the courtroom here.

Did you ever see any of those in the tire industry, Mr. Steepleton?

A. No, sir, I don't think so.

Q. They are not competitors of yours?

A. I am sure not. However, I don't know all my competitors. I am not sure.

355 Q. Now, I want you to tell me whether or not, as defined in the tire industry, a sale to a purchaser not for consumption but for resale—whether or not that is a wholesale or retail sale.

A. Well, a sale to a person for the purpose of resale is certainly considered a wholesale sale, and is evidenced in this state by the absence of application of the Tennessee sales tax.

Q. No question that if you sell something to somebody, knowing that they are going to resell it, that you are a wholesaler in that aspect of your business?

A. That is right. And we are required to show their exemption certificate number.

Q. Now, is that the classification in the tire industry, those two illustrations you have given, that if it is for consumption or use, it is retail, and if it is for resale it is wholesale?

A. That is correct.

Q. Now, do you know or have you ever known of any other definition in the tire industry?

A. I have never heard of any other definition.

Q. Now, how many tire dealers—would you just take a random guess—are there in the United States?

356 A. That is a tough one.

Q. Well, are there many thousands of them, too?

A. There are many thousands, yes, sir.

Q. And if there is anybody in the industry that knows any different definition, it would not be any great trick for them to produce them, would it?

A. No, sir.

Q. Now, you mentioned about knowing the purchase and the use for which a purchase was made. You said something about sales tax exemption certificate.

State whether or not every person——

Mr. Mitchell, have you got the Code there?

I want to know if at all times material to this case you knew that there was in effect a statute of the State of Tennessee for sales tax, and this law which provides in part as follows:

"Retail sales or a sale at retail means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property."

Do you know that?

A. Yes, sir, I am familiar with that.

Q. (reading) "And shall mean and include all
357 such transactions as the Commissioner on Finance & Taxation on investigation finds to be in lieu of sales, provided that the sales for resale must be in strict compliance with the rules and regulations."

Now, did you know and have you conducted your business at all times material to this lawsuit, that all sales are retail other than for resale in the form of tangible personal property?

A. Yes, sir.

Q. So, as far as you are advised, the definition of the State of Tennessee in its code and the definition of the industry are identical?

A. Yes, sir.

Q. Now, when people come to you to buy something, since the State of Tennessee says that every sale is for retail—is a retail sale unless it is for resale, you have got to collect that three percent sales tax, don't you?

A. Yes, sir.

Q. Except in particular cases?

A. Yes, sir.

Q. Now, what are the instances when you don't have to collect that three percent sales tax?

358 A. Well, there are two instances. One is in the case of a dealer——

Q. Let's don't go into use tax, out-of-state, things like that. Just go into—about the certificate of exemption.

A. In the case of a dealer buying for resale, he furnishes us with his tax exempt certificate, which qualifies him to purchase without the application of sales tax.

Q. Now, Mr. Steepleton, according to your previous testimony and according to this sworn answer to the interrogatory filed in this case, your gross dollar volume in sales in 1960 was nine hundred three thousand dollars and some odd figure. But nine hundred three thousand dollars, is that correct?

A. Yes, sir, that is substantially correct.

Q. And according to a tabulation which the Government has made as part of Exhibit 7, in that year your sales for resale were $5,839—$58,395.00.

Is that correct, substantially?

A. I imagine so.

Q. And our information is that if it is wrong, it is not much wrong?

A. No, it is not much wrong.

Q. Now——

359 A. (Continuing) There are some discrepancies in their audit, but it is substantially correct.

Q. Now, that $58,395.00, was that sold to people who had certificates of exemption and who were resellers of what they bought from you?

A. Yes, I am sure it was.

Q. And was every other penny of that $903,000.00 sold to people who did not have certificates of exemption and who were consumers of what they bought?

A. Yes, sir.

Q. And under the definition of the industry, and under the definition of the Code of Tennessee, was all of that $903,000.00 of sales, with the exception of $58,395.00, sales at retail?

A. They were.

Q. Any exceptions to that whatever?

A. I don't see how there could be an exception.

Q. Very well, sir.

Now, the Government has put on this tabulation an item which I want to question you about at some length.

That is what they call national account sales. And they ran them into—classified them on Exhibit 7 as $115,597.00 in the aggregate of sales to the General Tire & Rubber Company.

360 Were they sales by you at all?

A. No. sir.

Q. Well, now, just tell us what these transactions that have been lumped together as national account sales are.

A. Well, Mr. Burch, it is rather a bone of contention, sometimes with tire dealers, but our company and other rubber companies——

Mr. Burch: Go ahead, sir, I am listening.

A. (Continuing) ——find it expedient to make some direct contracts of their own.

And as a part of our obligation as a franchise dealer, we are requested to make delivery of tires to their customers.

Q. Now, who does the billing of the customer for that sale?

A. The billing is done at our Akron home office.

Q. Do you do anything yourself other than maintain a stock of merchandise from which you make drafts for the customer, and advising the company that these drafts have been made on the stock for which you receive reimbursement to the value of the stock, plus a stipulated commission?

A. No other. That is, the one exception to that is that if we don't have the tires, we probably might go out to the division warehouse and pick it up for this customer of General and deliver it to them.

Q. So you render a service to the General Tire
361 for which you bill the General Tire Company, but you have no financial transaction with the customer whatever, do you?

A. Correct.

Q. Now, is that true of each instance of these $115,597.00 of aggregate sales that the Government has counted as sales by you——

Mr. Burch: Your Honor, may I stand around here where I can hand this to the witness?

You have seen that, Marvin?

Mr. Tincher: Yes, sir, Plaintiff's Exhibit number 3.

Mr. Burch: It is actually not, it is the same, but I don't think this—it is not marked as exhibit.

Mr. Mitchell: Down in the lower corner, Mr. Burch.

Mr. Burch: Oh, yes. I am sorry.

Q. (Continuing) I hand you herewith Plaintiff's Exhibit number 3, and ask you if that is a tabulation of national account sales.

A. I am certain it is, Mr. Burch.

Q. It may be stated that this—we have checked it and the Government has got it with reasonable accuracy.
362 A. All right.

Q. Now, will you, without making any attempt to be inclusive, just pick up three or four names on the sheet on there—some three or four sheets there. Call them out, so the Court will know the nature of the transaction.

A. Well, here is Kroger, Kroger and Continental Baking Company, whose home office is at Cincinnati, and they have bakeries all over the country.

Q. Just give the rest of the names you picked out, please.

A. There is Wilson Packing Company, who have headquarters in Chicago. Diamond Match Company, Texas Gas Transmission.

And there are others who are classified in here that are manufacturers, such as Arrow Equipment Company, and so on, certainly who buy at manufacturers level, and we deliver tires to them for General Tire & Rubber Company.

Q. Now, you were shown—the Government asked you—and the Government identified as Exhibits 9 and 10 the ledger sheets of the company.

I will ask you to look at Exhibit number 9 which are ledger sheets showing these national account sales.

Now, in each transaction there, does it show to whom the delivery was made?

A. Yes, it does.

363 Q. Mr. Steepleton, will you pass that sheet to the Court.

Now, your typical ledger sheets which are identified as Plaintiff's Exhibit number 10 show only the person to whom the billing was made, is that correct?

A. That is correct.

Q. Now, do you ever—will you pass that to the Court, too?

Do you ever present the bill, or do you ever receive a check, or do you ever receive anything of financial value whatever from the customer of the General Tire Company who receives the product delivered to it under the national account sales?

A. I do not.

Q. Have no connection with it whatever?

A. No.

Q. Do you collect a sales tax from him?

A. No.

Q. And on that list that the Court has—the Exhibit 9 or 10, whichever it is—the one that has the big interlineations in it—did you collect a dime of sales tax on any of those transactions?

A. No, sir.

Q. Now, on the others, which are typical ones that have the name of the customer at the top—the other
364 sheets that the Court has—did you collect a Tennessee sales tax in each case?

A. Yes, sir.

Q. Unless they had a certificate of exemption?

A. Yes, sir.

Q. Did the transactions which involve the delivery of tires to the customer of General Tire Company there shown on the national account ledger sheet—were they carried into your profit and loss statement at all, sir?

A. They are not even entered into sales.

Q. They are not carried in your sales records?

A. And we collect no money. This is only a memorandum account.

Q. Now, was this system set up and was it in effect for years before you ever were favored with the acquaintance of Mr. Micklish?

A. It has been in effect for longer than I have been in the tire business.

Q. And this was something that had been long in effect, and nothing that was gotten up to meet the exigencies of this case?

A. Correct.

Mr. Burch: That is all.

365 **Cross-Examination,**

By Mr. Tincher:

Q. I have just a few questions, Mr. Steepleton.

A. Excuse me.

Q. With reference to the national account transactions, I believe that some of those customers, such as Arrow Equipment Company, you have testified were manufacturers and you were delivering tires to such customers to be installed on equipment which would then be sold, is that correct?

A. That is correct.

Q. In addition to Arrow Equipment, then, do you recall the names of others who were national account customers —other manufacturers?

A. Well, we have made deliveries to some of the truck dealers.

Q. Tri-State Mack?

A. Specifically Tri-State Mack. You have to be able to get the Mack Truck Company to issue the purchase orders, and those tires were billed by General Tire & Rubber Company to the Mack Truck Company at Allentown, Pennsylvania.

Q. International Harvester is another one?

A. That would be correct.

Q. (Continuing) ——in that category. How about
366 Foster Trailer Company?

A. Foster Trailer——

Q. Were such customers—were they people who would use the tires which you delivered to them on new manufactured equipment and would then resell that equipment, is that correct?

A. I presume so, yes, sir.

Q. Then, did you take into account those sales for resale, perhaps, when you told Mr. Burch that there were no other sales that had been made by Steepleton Tire Company?

A. We did not sell those tires, sir. We deliver them for General Tire & Rubber Company. They sold the tires.

Q. But, whether the sale was made by you or the General Tire & Rubber Company, at least those sales were not included in the figure that you stated a while ago as being substantially correct for all your resales, were they?

A. You will have to do that over.

Q. Let me back up just a minute. I think you are a little confused.

Mr. Burch: Mr. Tincher, actually the figure fifty-eight thousand, our check has disclosed, for national accounts —though I don't think there is any importance—is
367 actually about twenty-eight thousand dollars less. We have taken in our retail sales everything you put in—I mean, the wholesale sales—our resale sales.

Q. The figure $58,395.00 which you accepted as substantially the figure showing sales for resale did not include, did it, your sales to Tri-State Mack, to Arrow Equipment Company, to Foster Trailer Company and International Harvester Company?

A. I presume that you have those in the national account category, which is where they correctly belong.

Q. Your answer, then, is no, it is not included, is that correct?

A. I did not make your audit with that figure. I do not know what it is. You made it.

Q. What is the rate of commission which Steepleton Tire Company receives on these deliveries of tires to national account customers, Mr. Steepleton?

A. Well, it is not a constant thing. There was one time that there was a specific amount set up for each particular size and type of tire. And then later on it was changed to a percentage of the basic billing price. And I am not exactly certain what it is currently. But it has always been somewhere in the neighborhood
368 of about ten percent, that is, those classed on the commercial—those classified as commercial accounts. I believe on manufacturers accounts it is about two and a half percent.

Q. That would be such accounts as Arrow Equipment Company and International Harvester, would not it?

A. Right.

Q. I want to show you here from Plaintiff's Exhibit number 3, the transcription that was made by Mr. Mick-

lish relative to a delivery to a commercial account, if that will be sufficient—perhaps there is another one that will be more meaningful—this one which is listed—numbered as sheet 13, sold to General Tire & Rubber Company, date November 2, 1960, and the words "delivered to Tri-State Mack Distributor," and I would like to ask you to explain the various percentage entries which appear on that invoice.

A. Mr. Tincher, as you probably know by now, since you have spent a lot of time on this case, that the billing price and billing procedure on tires has changed and fluctuated many, many times, as many as six times throughout the year that we are in question.

Now, in this particular instance, this was the buying price of this tire that we paid General Tire & Rubber Company originally for it.

369 And you will notice that up here in the corner it says S. M. 8—08176. That is the stock number—the number which we referred back to the invoice of General Tire & Rubber Company, showing where we bought the tires.

And the percentages that are discounted from the billing prices are our net cost, plus certain excess tax, which becomes the net amount that we originally paid for this tire on stock number—number 08176.

It is billed right back to them exactly like they bill them to us.

Q. All right. The percentages, then, which have been entered then on that invoice—the same percentages which were involved in your purchase——?

A. Yes, sir.

Q. (Continuing) ——of this particular tire?

A. Yes, sir, identically, with one exception. Well, percentages, yes, sir. All the percentages are identical.

Q. So the purchase price which you paid for those

tires to General Tire & Rubber Company is now the total which you are billing General Tire & Rubber Company for for having delivered those tires to the customer, is that correct?

A. That is correct.

Q. And in addition to that purchase price, you have
370 entered on the invoice a percentage figure for the delivery charge, actually?

A. That is correct.

Q. Now, those tires which have been purchased from you on a stock number invoice number were added, I suppose, to your other purchases of tires throughout the year in arriving at the volume of tires handled by you during the year?

A. No, this is charged back.

Q. Were you and your company not given credit for those particular tires in arriving at your volume, which included bonuses?

A. No, this is deducted from your bonus statement, which—and would show the exact amount, and would pretty closely correspond with this tabulation of national account sales.

Q. If I understand correctly, the tires which you deliver from time to time to national account customers are tires which you carry in your stock and for which you have either already been—already made payment or for which you have already been billed by Steepleton—by—correction, by General Tire & Rubber Company.

A. In some instances, if we happen to have the tires, it is easier to deliver the one we have than it is to drive a mile out or two miles to get another one just like it.

371 Q. And you do in the regular course of business make such deliveries to General Tire & Rubber Company national account customers from your store?

A. Yes, sir.

Q. Is any part of your stock obtained on consignment from General Tire & Rubber Company?

A. No, sir.

Q. Mr. Steepleton, what are the largest tires which your company stocks and that were regularly in stock?

A. You mean my company?

Mr. Tincher: Yes, sir.

A. Or General Tire & Rubber?

Q. Steepleton Tire Company. Just describe or tell what the largest tires are, the largest ones that you have carried in stock.

A. I think the largest I have in stock right now is a 26.5/25.

Q. And on what type equipment would that size tire be used?

A. Earthmoving equipment.

Q. Pardon?

A. Earthmover.

Q. Did you carry such equipment in stock in 1960?

A. I don't recall. I doubt if we did, because I just recently got into the earthmoving phase of the business.

372 Q. Yes, sir. On the other larger tires that you have carried in stock, what types of vehicles would they be used on?

A. I don't know if I understand what you are getting at.

Q. Are the others just over-the-road truck tires?

A. All size tires, be different sized stock.

Q. For earthmoving equipment?

A. Road graders, too. Airplane tires or anything, earthmoving, all kinds.

Q. When you sell this large earthmover tire, do you consider you are making a retail sale?

A. Yes, sir.

Q. When you sell such equipment as that?

A. If the man is going to use them, yes sir.

Q. Is the same true if you are selling airplane tires?

A. Yes, sir.

Q. Do you carry in stock and make sales of aircraft tires which are used by the large commercial airlines flying in and out of Memphis?

A. No.

Q. You do not?

A. No.

Q. Would you tell some of the largest over-the-road
373 type of truck tires which you have carried in stock?

A. Well, I think that 1100/22 is about considered the largest type that is normally used in over-the-road highway transports.

There are some others, larger sizes, but they are rare.

Q. Well, is the 1000/20 size tire another size tire?

A. 1000/20 is probably the most commonly used, yes, sir.

Q. What size equipment are they used on normally?

A. What size?

Q. Yes, in regard to the tractor-trailer transports.

A. Well, they are usually used in over-the-road transports but probably haul anywhere from twenty to thirty thousand pounds pay load.

Q. And even though you sell those in large quantities to a particular transport company, you consider that nevertheless to be a retail sale?

A. Yes, sir.

Q. Would that be true even if you sold as many as fifty 1000—size 1000/20 truck tires to Gordon Transports, for example, who would then put them in stock and use them as the occasion arose?

A. Yes, sir.

Q. Would your answer be the same, or would you
374 consider that nevertheless a retail transaction if you sold as many as two hundred of those truck tires?

A. We would still have to charge sales tax on this, Mr. Tincher, so it would still be a retail sale.

Mr. Tincher: I believe that is all.

**Redirect Examination,**

By Mr. Burch:

Q. Just a minute, Mr. Steepleton.

Do you know anything about this phrase that the Government lawyers have been using about discounts from list price, and that sort of thing?

A. Well, I think that in most cases the manufacturers of practically all commodities put out some kind of suggested list price.

Q. Well, are they anything more than suggestions?

A. But they are nothing more than a suggestion, because in the highly competitive market on truck tires the net price is all we ever quote.

Now, we may have a method of arriving at net price. We might have—figure some discount from their suggested resale list, or we might take our cost price and add the profit to it, but we sell on that price basis.

Q. Well, is it or not, as has been suggested here,
375 that the user of many tires and the big purchaser always get a better price for the same tire than the little purchaser?

A. Not necessarily so, no, sir.

Q. It depends on the competitive situation of the market at the time, and many, many factors, does it not, other than the size of the purchase?

A. Yes, sir, it depends on the market conditions at the time, and——

Q. Do you know the Engelberg Packing Company, sir?

A. Yes, sir.

Q. A big operator here with a lot of trucks, aren't they?

A. Yes, they are. The plaintiffs subpoenaed Mr. Engelberg into court to show that he had a lot of trucks.

Q. Do you know George Harris?

A. George Harris is a colored school bus driver.

Q. Got one school bus, hasn't he?

A. Yes, somewhere—something like that.

Q. The Government did not subpoena him, as far as you know, did they?

A. No.

Mr. Ray: I would like to inquire, if I may, the purpose of this.

Mr. Burch: I am going to show you, by a comparison on the invoices, that Engelberg Packing Company
376 and George Harris, who is a colored school teacher, paid the same thing for a set of tires.

Mr. Ray: What does the connotation there that the Government did not subpoena him mean? Or is that some particular meaning?

Mr. Burch: The Government, like everybody else, is not the great white father that it sometimes purports to be. And if I might, I would like—would like to show that?

Is that all right?

Mr. Ray: Well, we concede that. You don't have to prove that.

Well, now, go ahead, then.

Q. Now, do those two invoices show what I suggested that they might show?

A. They do, sir.

Q. Just state what they show, just call them off.

A. Here is Engelberg Packing Company, two 750/20 Traction Rib 10 ply truck tires at $78.00, plus federal excise tax and sales tax.

Here is George Harris, who is a little farmer I think out here at Millington and operates a school bus.
377 The two are identically the same tire at identically the same price.

Q. What dates were they bought on?

A. Engelberg Packing Company invoice is 11-29-60. And George Harris is 9—looks like 19-60.

Mr. Burch: Now, I ask those just to be marked the next exhibit.

(Thereupon said copy of invoice to Engelberg Packing Company was accordingly marked as Defendant's Exhibit C and said copy of invoice to George Harris was accordingly marked as Defendant's Exhibit D, respectively, and same will be found among the exhibits in the cause.)

Q. Whartons Transport is another one of the ones subpoenaed by the Government, aren't they?

A. Yes, sir.

Q. A big operator?

A. Yes, sir.

Q. And who is C. E. Lomax?

A. C. E. Lomax is a gravel hauler. I think he has one dump truck, maybe two. I don't know.

Q. And who is H. L. McClellan?

378 A. H. L. McClellan is a little account at Tupelo, Mississippi.

Q. And Bryce Packaging Company?

A. Bryce Packaging Company is a small account here that has two or three trucks.

Q. I hand you herewith a sheaf of invoices, and ask you if that does not show you sold them the same merchandise, to all of them, at substantially the same price?

A. (Witness examines documents) Yes, sir.

Mr. Burch: Make that——

A. (Continuing) For a clarification, Mr. Burch, there is two items on this Lomax invoice, so I wanted to be sure that they don't confuse one kind of tire with another.

Mr. Burch: Make that the next exhibit, please.

(Thereupon said copies of documents were accordingly marked as Defendant's Collective Exhibit E, and same will be found among the exhibits in the cause.)

Q. Ace Freight Line, is that a pretty good size operator?

A. Mr. Yost, at Ace Freight Line, was subpoenaed by plaintiff, but I don't believe he has had the opportunity to testify, but I think he is a pretty good sized operator.

Q. Chapman Chemical Company?

A. Small.

379 Q. But were subpoenaed, were they not?

A. Yes.

Q. And W. L. McClellan?

A. I think there again is the same party down at Tupelo, Mississippi, a small operator.

Q. Did all those purchasers get the same price on the same item?

A. They are not all exactly the same, but they are close, and very close to the same price. There is very little difference.

Mr. Burch: Make that collective Exhibit F.

(Thereupon said copies of documents were accordingly marked as Defendant's Collective Exhibit F, and same will be found among the exhibits in the cause.)

Q. Actually, Mr. Steepleton, I am taking time on something that I think is not material, and I want to simplify it by asking you this:

If you could show that they all purchased at substantially the same prices, if you had charged the little man three hundred percent more than you charged the big operator, would they both in the tire industry still have been retail sales?

A. Yes, sir.

380 Q. Would not have made any difference about the price, if they were all used by the consumers?

A. Correct.

Q. Now, my friend Mr. Tincher here asked you something if you sold some airplane tires to big operators, wouldn't you consider that a wholesale sale, and you answered that it would be a retail sale, as I took it.

A. That is correct.

Q. Now, I want to read you this definition. It is called the retail sales tax act.

"'Retail Sales' or a 'sale at retail' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property."

Now, you and everybody else in the State of Tennessee operating under that act have to collect that tax, don't you?

A. Yes, sir.

Q. You read here in the newspapers where business men have been indicted for failure to comply with it here within the last ninety days?

A. Yes, sir.

Q. Now, as much as we like Mr. Tincher and these other gentlemen, do you know whether any of their
381 interpretative bulletins would help you if you were indicted for the violation of that statute, as calling it as something different from what the law says it is?

A. I don't believe they would.

Mr. Burch: That is all.

Mr. Ray: What about that are you relying on—to show the materiality—is that the purpose?——

Mr. Tincher: May I see these last exhibits?

**Recross-Examination,**

By Mr. Tincher:

Q. Just one or two questions with regard to these latest exhibits.

In Defendant's Exhibit C, reflecting a transaction with Engelberg Packing Company, and one with George Har-

ris, did your company provide services in the way of inspection, removal and mounting tires for Engelberg Packing Company of the nature that has been testified to?

A. Yes, sir; yes, sir.

Q. Did your company provide such services for Mr. George Harris?

A. Yes, sir.

382 Q. Were those provided on a regular basis, then, at Mr. Harris's place of business?

A. Mr. Tincher, the degree of service that is rendered any customer is relative or proportionate to the amount or number of vehicles and the amount of tires he operates. And we render this same service to the passenger car buyer. I think that it is common practice in many instances in industries such as the gasoline stations that you probably went by, if you bought gasoline once a week, you get the windshield wiped off once a week; if you bought every day, you got it wiped off every day.

Q. Now, will you answer my question.

And still you would send the service truck to Mr. George Harris's place of business or to his home to inspect his tires or rotate them, or match and mate those tires or put air in the tires, as you did to Engelberg Packing Company's place of business and other of your larger customers?

A. Yes, sir.

Q. You did that? Who was the service man?

A. I am sure we did. I don't know of any other way we would have got tires on the bus without going out here and putting them on.

Q. Do any of the customers come to your place of

383 business with a single vehicle that want tires?

A. Well, as far as the truck tire business is concerned, very few, because we are so—it is such a very small place and small service area that we can't service

them there. I would say that ninety-nine and ninty-nine one hundredths percent of our truck tire business is handled away from our place of business.

Q. But it was your practice to have a regular time for your service trucks to go to the larger customers to service their tires or rotate and match or mate, pull and mount, but the smaller customers you did not provide that service, is that correct?

A. Yes, sir, I did. However, I would like to qualify that a little bit.

If a man is operating twenty trucks, he requires probably weekly service. If he is operating one truck, we probably won't have to go check on him but maybe every three or four months.

Q. Approximately——

A. (Continuing) It is still relative to the amount of business, the number of trucks and tires he bought.

Q. The fact is the operator of a single truck, normally you would be simply told by the service man at the
384 time he figured now maybe Mr. Harris is ready for new tires or would have a couple of tires recapped, is that right?

A. Either by the salesman or by the service truck. Often we have the service truck when he is in the vicinity, and we go by there and perform whatever—see whatever service is necessary.

Q. I wish you would explain just a little bit for clarification the manner in which your sales to the various county governments or other governmental units have been made, Mr. Steepleton.

A. How they have been made?

Q. Yes, the manner in which those sales are handled and the pricing that you make the sales at.

A. Well, they are made by solicitation of our salesmen, and the pricing we get is all we can.

Q. Well, isn't it a fact that in respect to substantially all your county governments, county school boards, county highway departments, that you have made the sales at the regular published State list price?

A. We have been forced to meet some very low competitive prices in some instances.

Q. Yes, sir. And that has been the same price—the usual price at which you made this type of sale, hasn't it?

A. Well, some have been sold at that price, some
385 higher and some lower.

Q. Yes, sir. When the sale is made at the State list price, what it is, tell the Court whether that State list price is lower or as low as your dealer price at which you have been billed for the tires.

A. It is lower, usually lower, and sometimes considerably lower, because we are only meeting a competitive situation.

Q. Now, when you sell tires to a county highway department at a price which is less than the price at which you were billed for the tire, will you explain how you can carry on that transaction without monetary loss?

A. Well, we are really—usually we are always reimbursed by our supplier.

Q. By the General Tire?

A. For the delivery.

Q. By the General Tire & Rubber Company?

A. Yes, sir.

Q. How is that reimbursement handled?

A. Through the claim, we are also reimbursed for the federal excise tax for which they are exempt.

Q. After you have been credited with the difference between the price you paid and the price at which you sold the tire, plus the federal excise tax which you
386 have already paid on your purchase of the tire, do you get any other reimbursement from General Tire & Rubber Company on such transactions?

A. We get a delivery commission comparable to the national accounts commission. And there again, this volume of sales is deducted from our purchases for the purpose of figuring volume, same as the national account sales.

Q. Instead of deducting the total purchase price of this tire, does General Tire & Rubber Company simply deduct the difference between your selling price and your purchase price, plus the federal excise tax?

A. They reimburse us at the selling price.

Q. For the difference between——?

A. The difference between selling price and——

Mr. Burch: If Your Honor please, we can go on as long as counsel wants, but that has nothing to do with retail.

Surely, a man is not going to buy gas for 22.9 cents a gallon, if a company just temporarily voluntarily determines to let a dealer make those sales—nobody would suggest that is not retail.

Mr. Tincher: I understand it, Your Honor. This has been the practice over many years, and not the result of any temporary situation.

387 Mr. Burch: Then too with Standard Oil Company, Your Honor, for twenty years. And the price in this one industry—it happens every day—you have got to keep your people competitive.

Q. Is there any difference, then, Mr. Steepleton, between the transactions where you have delivered tires to customers of General Tire & Rubber Company under the national account transaction type of business and the sales of tires to a county highway department under the arrangement you have just described?

A. A very distinct difference. This sale to our county highway department is a retail sale because it went to consumers, and we do the billing and not General Tire & Rubber Company. And it is very, very different.

Mr. Tincher: Yes, sir.

A. (Continuing) This is only a price protection arrangement.

Q. And you consider that was a retail sale, notwithstanding the fact that the county highway department is purchasing those tires at less than the dealer price you had to pay for tires?

A. Certainly. Our people go out, service and mount those tires and take care of them from now on
388 until they are worn out. And the complete concept of it is a retail transaction, a service company taking care of its retail customers.

* * * * * * *

389 **Recross-Examination (Further),**

By Mr. Tincher:

Q. Mr. Steepleton, in your testimony yesterday, you made some statement in regard to sales of earthmover tires, and I believe you stated that they were considered by you sales—that is, of earthmover tires—to be retail sales, is that correct?

A. Yes, sir.

390 Q. And do I understand correctly that during 1960 you were making sales of earthmover tires to contracting companies and to county highway departments, among others of your customers?

The Court: Excuse me just a minute.

A. I am sure that we had them for sale, and it is very possible we sold some.

Q. And that is a regular part of your business, isn't it, normally?

A. Yes, sir.

Q. To sell such tires.

What is the size of earthmover tires? Are they pretty much all the same size or they vary in size?

A. Vary, many types tires, types, descriptions, a great many.

Q. Would the 26.5/25 be one of the usual sizes that you would sell?

A. Yes, sir; yes, sir.

Q. And do you sometimes sell those in quantities of more than one at a time?

A. We would love to. Very seldom ever do but usually one or two at a time.

Q. And how much would one of those tires weigh, Mr. Steepleton?

391 A. Approximately a thousand pounds.

Q. And what is the usual price for that size of tire.

A. Whatever we can get for it.

Q. Well, I assume that you try to sell it for a profit rather than sell it for a price which the customer will pay?

A. Well, very naturally, that would be the purpose of being in business.

Q. Yes, sir. Now, I will show you here from the price catalog which Mrs. Lauderdale identified in her deposition.

Turn over in that on page six, which is headed "Earthmover Tires" and I ask you to look under the heading "All Duty-Wide Base—Nygen" tires, size 26.5/25.

Mr. Mitchell: Just a minute.

Mr. Tincher, before you let it be passed up, could you indicate the date of the catalog to which you have just referred?

Mr. Tincher: If I recall correctly, there are several dates there since the collection of sets of prices have been compiled at different times.

This is in the commercial price of truck tires and tubes, effective date December 7, 1960.

Mr. Mitchell: Thank you.

392 Mr. Tincher: And also in this same catalog of general prices for February 16, 1960.

Q. Before you attempt to answer the question, would you first tell me whether your earthmover tires are carried in your stock as general truck tires in the category of truck tires?

A. Yes.

Q. When they are placed on your invoices——?

A. That is as far as our own inventory accounting is concerned.

Q. Yes, sir. And for your accounts receivable ledger, they would appear with the symbols G. T., is that correct?

A. Right.

Q. Now, if you will look on the price list there at 26.5/25 here about Nygen, would you tell me at what price that size tire was listed in the catalog there?

A. Well, on this particular price list it was $2,248.95.

Q. Yes, sir. Now, could you give us some idea of the price at which you were selling that particular tire during the year 1960?

A. Somewhere in the neighborhood of nine hundred dollars.

Q. To contractors and the highway department customers?

A. Anybody that would buy it. That was about the market price on that type tire at that particular time, I presume.

393 Q. Well, as a general rule, wouldn't those be the only type of customer to whom you would have sold that type of tire?

A. Well, certainly I don't think you would buy one.

Q. Yes, sir. But, in other words, contractors and county highway department would?

A. People who own earthmover equipment.

Q. Yes, sir. Now, I will show you here a transcription sheet which has been made from an invoice for Tipton County, which indicates the sale of such a tire.

Do you recognize that as being the type of invoice from your company which would be shown with reference to such a sale?

A. It could be. It is only some figures that were put on here by your—what do you call him?

Q. By Mr. Micklish?

A. Yes. This isn't an invoice.

Q. No, but it is taken from the invoice, is it?

Do you see the price at which that tire sold?

A. $952.77.

Q. $952.77, is that correct?

A. That is the figure you have on there, yes, sir.

Q. Now, this particular invoice, which is of the Steepleton books and records, which has been copied, and
394 I will ask you to read the notation at the bottom of the sheet.

A. Mr. Micklish or someone has written on this piece of paper. It says: "This price is on state and county billing price and is due the tenth of following month after purchase, and if not paid by that date, ten percent a month will be added until the retail price of $2,261.65 is reached."

I doubt very seriously if that was billed to a county. I don't think it was.

Q. If you were told the invoice so indicates, you would not have any reason to question that was billed to Tipton County?

A. I certainly would not, no, sir.

Mr. Tincher: May I ask that this transcription be identified as Plaintiff's Exhibit number 11.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 11, and same will be found among the exhibits in the cause.)

• • • • • • •

395 Q. A little further clarification, Mr. Steepleton, on Plaintiff's Exhibit number 11.

This, I take it from your testimony, there is no question but that it relates to a sale in 1960, November 12th to be exact, to Tipton County, is that correct?

A. I don't know, sir. I would have to see the invoice. I can't remember twenty thousand invoice numbers and tell which one is which.

Mr. Burch: Mr. Tincher, obviously he can't remember the only invoice you picked out in five years at the business, but I will stipulate it is exactly what you say it is.

396

Now, you state into the record exactly what you say it is.

Mr. Tincher: Exhibit 11—Plaintiff's Exhibit 11 is transcription made in part from invoice number 668999, dated November 12, 1960, evidencing the sale of an All-Duty Nygen 26 ply earthmover tire to Tipton County, the Highway Department of Tipton County, Tennessee.

Mr. Burch: It may be stipulated that it is just like Mr. Tincher said it is.

Mr. Tincher: Thank you.

Q. Mr. Steepleton, the price schedule which you had in your hands a moment ago, which I will again point to you, has a section headed "Commercial Price List."

What type tires are included in that section headed "Commercial Price List"?

A. Principally truck tires, earthmovers.

Q. Is that the type of price catalog which your salesmen use from time to time in making sales in the year 1960?

A. Well, they use six different price lists during the years so I presume this is representative of those few weeks that might have been——

397

Q. Yes, sir. And throughout the year 1960, I suppose there was a section which was headed "Commercial Tires" or "Commercial Sales" as it is in that one, is that correct?

A. I am not sure who the accounts were.

Q. In your business, and in the tire business generally, isn't it true that you have not only your dealer sales and your retail sales, but that you have a classification known as commercial sales?

A. Well, the term "truck tires" and "commercial" are more or less synonymous, and that is quite often the definition given to the truck tire price list.

Q. And that has been true over the years, then, has it not?

A. Well, one of them is headed "passenger tire list" and one is with the heading "commercial tires."

Q. And it is true approximately six outside salesmen who were employed in the year '60 were termed in your business records as commercial salesmen?

A. Truck tire salesmen, yes, sir.

Q. Commercial salesmen?

A. Truck tire salesmen.

Q. Now, answer my question, Mr. Steepleton. Were
398 they or were they not termed commercial salesmen?

A. Well, they could have used—either term could have been used.

Q. And it was used, was it not?

A. I am sure it was.

* * * * * * *

399 Q. Yesterday a copy of an invoice was made Exhibit C to your testimony, relating to Engelberg Packing Company, and Exhibit D relating to a sale to George Harris.

I believe your testimony was that the actual price of the tires was the same.

400 I will ask you to look at Exhibit C and tell me whether or not the two tires that were sold to Engelberg Packing Company on that invoice were billed at $70.17 rather than at $78.00.

A. Well, I think you will see that this is—there is a reference to an incorrect price on this and a correction showing the correct billing.

Q. Does it show on the invoice that that is a correction?

A. Yes, sir.

Q. Would you read that language there?

A. It says, "Additional billing on invoice number 67678," describes the merchandise, "Billed at $70.17, should have been $78.00," and difference of $7.83 charged each.

Q. In addition to dealer sales, which you testified yesterday are exceptions from the requirement for collecting Tennessee sales tax, is there not another exception, namely where you perform recapping for the customer and have other service charges, rather than sales of merchandise?

A. I think the Tennessee Code does not provide or not permit us to collect sales tax, but we pay the State of Tennessee a use tax on materials used.

Q. That would be the raw rubber with which you recap the customer's tires, is that correct?

401 A. Yes.

Q. That use tax is three percent, is it not, I believe, the same as the sales tax?

A. Yes, sir.

Q. And your company also pays such a three percent use tax on merchandise which you take out of stock and use on your own vehicles, does it not?

A. Yes.

Q. And you so report that in your Tennessee sales tax return?

A. I am sure we do.

Q. The use tax and sales tax are lumped together and reported on one report to the State of Tennessee, is that right?

A. I don't make out the reports, Mr. Tincher. I assume that is right.

Q. And this portion of your business——

A. (Continuing) I believe the use tax is charged to us directly by the General Tire & Rubber Company on their invoices for materials.

Q. Do you know whether that is true?

A. I don't know, but I think it is.

Q. This portion of your business made up from receipts for recapping of tires and performing services,
402 repairing tires and service call, and so forth, makes up approximately forty-five percent of your gross business, does it not?

A. Name the category again.

Q. The recapping and service, just the things other than sales of merchandise.

A. Probably somewhere in the neighborhood of thirty-five or forty percent.

Q. I believe you testified earlier it was forty-five percent in your deposition. Is that not right?

A. I don't recall the exact percentage. I am sure—don't think it is important.

Mr. Tincher: No further questions.

**Redirect Examination,**

By Mr. Burch:

Q. Mr. Steepleton, have you ever sold one of those earthmover tires for as much as twenty-two hundred dollars?

A. No, not that particular described item, no, sir.

Q. If, for instance, I owned a farm down in the delta and had a Euclid on it that would use those tires, and I would come into your place to buy an item that expensive, could I have bought that tire for just exactly what it was sold to Henry County or Tipton County?

A. Yes, sir.

403 Q. If I had sense enough to accumulate——

A. (Continuing) ——at that particular time.

Q. If I had sense enough to accumulate the money to buy a farm, it would be unlikely that I would be stupid enough to pay twenty-two hundred dollars for something that the market was nine hundred, and you would assume that, wouldn't you?

A. Yes, sir.

Mr. Burch: Now, where is that transcript?

Just give it to me there, will you, please?

Q. Now, with reference to the credit item that was put down there to prompt the customer to pay is—what is the price, nine hundred and what?

A. $952.77.

Q. Is that a retail price?

A. That is a retail price.

Q. Why is it a retail price?

A. It is a retail price, it is what marketing conditions dictated.

Q. Is that tire sold to a user?

A. Yes, sir.

Q. If Henry County had been stupid enough to pay twenty-two hundred dollars, and you had been

404 greedy enough to ask them to pay it, would the price have been a retail price?

A. Well, I think anything we collect would be a retail price.

Q. Why?

A. Because we sold the consumer.

Q. If the credit of Henry County had been sticky and the account had run six months, and you had gotten ten percent a month, would the price have been a retail price?

A. Yes, sir.

Q. Why?

A. Because it was sold to the man who used it, the man that consumed it.

Q. Is there anything on that invoice—and look at it carefully—that indicates that the price is not a retail price?

A. Not one thing.

Q. Now——

A. (Continuing) Other than something that somebody wrote here with reference to——

Q. Well, read it too.

Does that say that $903.00 is not a retail price? Does it say it is a wholesale price?

A. Well, he has copied something here that says——

405 Q. Instead of trying to interpret it, suppose you just read it, will you, Mr. Steepleton?

A. Says: "This price is on straight and county billing price and is due the tenth of following month after purchase, and if not paid by that date, ten percent a month will be added until the retail price of $2,261.65 is reached."

Q. Is there one word in that $903.00 is not the retail price?

A. I did not understand. What is that?

Q. You find the word "wholesale" in there with reference to nine hundred and three?

A. No, sir.

Q. Is any transaction in the tire industry, based upon your experience of many years in it and in the many aspects of it, is any transaction where the goods are sold to the consumer a retail transaction?

A. I would say that all goods sold to the consumer is a retail transaction.

Q. Now, you were asked by these gentlemen about exceptions to the Tennessee sales tax about recaps.

And that is a third one, isn't it?

You didn't charge any sales tax to municipalities and counties, did you?

406 A. No.

Q. Any of them?

A. No, sir.

Q. That is an exemption under the law, isn't it?

A. Exempt.

Q. Now, you were asked about a commercial list. State whether or not they are lists of tires that are used by commercial vehicles.

A. That is a synonymous term with the nomenclature of named price lists.

Q. The word "commercial" refers——

A. Refers to type——

Q. (Continuing) ——type vehicle on which the tire is to be used, is that not correct?

A. Correct.

Q. And the type of salesman refers to the salesman who solicit owners of commercial vehicles?

A. Correct.

Q. There is no implication that the salesman is soliciting people who resell tires in the industry?

A. No.

Q. As a matter of fact, the amount of solicitation that those salesmen do to resellers is infinitesimal, isn't it?

A. There is very little of it. The fact of the matter
407 is they are not requested to solicit business for resale.

Q. As far as soliciting of that sort, it is virtually nonexistent?

A. That is right.

* * * * * * *

408 **WALTER E. deBRUIN,**

witness in behalf of the defendant, having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Mitchell:

Q. Would you state your name, please, sir.

A. Walter E. deBruin.

Q. And, for the record, the spelling of that is small d-e capital B-r-u-i-n, is that correct?

A. That is correct.

Q. Where is your home, Mr. deBruin?

A. Akron, Ohio.

Q. You are an attorney, I believe?

A. Yes.

Q. And you are employed in the law department of a large corporation, is that correct?

A. The Goodyear Tire & Rubber Company.

Q. Yes, sir. And is the law department of that corporation at the main office there in Akron, Ohio?

A. Yes.

Q. And your office in Akron is where?

A. In the law department at Goodyear.

Q. But the address is——?

A. 1144 East Market Street.

409 Q. For how long have you been in the law department of Goodyear Tire Company?

A. Since February, 1930.

Q. In the course of your duties as an attorney in the law department of Goodyear Tire & Rubber Company, did you familiarize yourself with, study, and generally become acquainted with the Fair Labor Standards Act soon after its passage in 1938?

A. Yes.

Q. After or shortly after that act was passed, did you assume responsibility in the law department at Goodyear Tire & Rubber Company for the handling of that company's matters in connection with the Fair Labor Standards Act procedures and practices?

A. Yes.

Q. Would you explain briefly about what time that occurred and the circumstances of it coming to you as one of your responsibilities?

A. My recollection is that my first acquaintance with the Fair Labor Standards Act was about the year 1940. I had been in the department for about ten years on other work, and my associate who had been doing work with the Fair Labor Standards Act since its passage in
410 1938 was assigned to the Goodyear Aircraft, our aircraft subsidiary.

Q. Was this——?

A. (Continuing) Then I—at that time I assumed responsibility for following the Fair Labor Standards Act.

Q. So that it became one of your principal responsibilities as of about 1940, as you remember?

A. As I recall, that was about the date.

Q. Do you connect the transfer of your associate to go to the aircraft subsidiary as being part of the war?

A. Yes.

Q. That is World War II, or defense aircraft, and that sort of thing?

A. Yes, sir. Our aircraft corporation expanded quite rapidly and so did a volume of business.

Q. In connection with your activities in there following 1940, did you have occasion to participate in any litigation in which issues of the Fair Labor Standards Act were involved in behalf of Goodyear Tire & Rubber Company?

A. Yes, I followed with local counsel any litigation in which the company was a defendant which involved

Fair Labor Standards Act. I would hasten to say that we were never a defendant in a Fair Labor Standards Act where the Secretary of Labor was the party plaintiff.

411 Mr. Mitchell: Yes.

A. (Continuing) We did have several cases brought by former employees.

Q. Yes. Was the Cron case that was decided in Middle Tennessee—and, just for the record, it is reported in 49 Federal Supplement 1013, and the style of the case is Cron vs. Goodyear Tire & Rubber Company—was that one of the cases in which you participated along with, of course, local counsel?

A. Yes.

Q. And do you recall approximately how many there were? The Cron case apparently was heard in about '43. Do you recall about how many other similar cases, that is, cases brought by employees under the Fair Labor Standards Act against Goodyear, in which you participated?

A. My recollection is that we had five or six that were tried.

Q. Yes. Now, then, Mr. deBruin, during the period between the enactment of the Fair Labor Standards Act in 1938 and its amendment, and the enactment in 1949 of the specific and more elaborate Retailers' Exemption, did you have frequent and regular occasion to check

412 into that law and to ascertain the various components of Goodyear Tire & Rubber—if it were in compliance where they were covered, and tend to such matters?

A. Yes. We never raised any question but what we were involved in interstate commerce, and part of our business involved a great number of retail stores through the country, many of which were subject to the Fair

Labor Standards Act and some of which were exempt, and it was my responsibility to follow the requirements of the law and issue instructions to our retail stores division and to see that our stores were at all times in compliance with the Fair Labor Standards Act.

Q. Yes. And was it true that all the stores operated or managed through Goodyear Tire & Rubber Company prior to '49 were covered, or were there some which by reason of circumstances were covered and some exempt and were not covered?

A. No, there were some stores that by reason of exemption were not covered by the Fair Labor Standards Act.

Mr. Mitchell: Yes.

A. (Continuing) And still are not.

Q. Yes. In regard to the period I am discussing, this was exemption for retail establishments as it
413 existed before the 1949 amendment.

A. That is correct.

Q. Now, then, did you from time to time have occasion to become familiar with the procedure and practices in the Field Office or perhaps Division Office of the Wage and Hour Administrator, and, if so, would you generally describe what procedure was followed by you in behalf of Goodyear Tire & Rubber Company with regard to whatever disagreements or questions of what-not that might come up under the Fair Labor Standards Act?

A. Yes, early in the administration of the Fair Labor Standards Act we had an agreement with the Department of Labor which was mutually advantageous. Should we get a complaint from a store out some place in the field it had been mutually agreed between Goodyear and the Department of Labor that the investigator in the field would make his report, and then his report would be turned in at the Cleveland office of the United States Department of Labor, and the investigator from the

Cleveland office would bring it to my attention. He and I would study what the investigation had disclosed. It gave me the opportunity then from the home office to check through our retail operation department to make an independent investigation. And so practically
414 ever since the adoption of the Fair Labor Standards Act that is the arrangement which we had made with the Department of Labor and under which we operated.

Q. Just for the record, Mr. deBruin, you have indicated your home office is at Akron. Is that real close to Cleveland and the Labor Department Office?

A. Yes, it is about thirty-five miles away.

Q. Now, then, prior to '49 were there any conferences that you had about minor disputes with Wage and Hour personnel, or any cases with which you became familiar through your review of information that you had of the Labor Department's that concerned or decided this issue of what is a retail sale in the tire retailing industry?

A. Well, that had been a matter of discussion between the rubber industry generally. I speak of it that way because I was familiar with the fact that other men charged with similar responsibility for the other rubber companies at Akron had discussed with me this question of what is a retail sale. We had discussed it with representatives of the Department of Labor, and we had not reached any unanimity of opinion.

Q. But prior to 1949 was there any thrashing out
415 of this or was there any litigation on the issue?

A. No, there had never—to my knowledge there had never been any litigation which gave us any guide—litigation.

Q. Now, then, in connection with the 1949 amendments to the Fair Labor Standards Act, and in particular regard to the Retailers' Exemption then enacted, did you, as a

member of the law department at Goodyear Tire & Rubber Company, and other attorneys in similar capacities for other rubber manufacturing companies follow this legislation and the Congressional history of it with some interest as perhaps a key or solution to some of your problems?

A. Yes. We took no steps to influence legislative action, but we were following the reports that came from the Congressional committees, and obviously, when the law was enacted we studied it with great interest.

Q. Now, then, Akron of course is known as the rubber city of the world, is it not. But, for the record, would you indicate which of the ones of the tire manufacturers, then, have their home offices situated at Akron?

A. Well——

Q. In addition, of course, to Goodyear Tire Company.

A. In addition to Goodyear, there is General, Fire-
416 stone, Goodrich and Mohawk. Mohawk is a smaller company. Also Seiberling. But the so-called big four all have their offices in Akron.

Q. That is my next question. The four you named, Goodyear, Goodrich, Firestone and General are known in the industry as the big four?

A. Yes.

Q. Outstanding in sales, are they not?

A. I might clarify that, sir. U. S. Rubber is sometimes put in that classification. I did not mention them because they do not have a home office in Akron.

Mr. Mitchell: Yes.

A. (Continuing) They also—I think they may be fourth or fifth or sixth in sales.

Q. Well, my question, of course, was directed to the ones located in Akron because you have already referred to it a time or two, so we are describing this that way, et cetera.

A. Yes.

Q. You met with attorneys having similar positions for the other three of the big four in Akron?

A. That is right.

417 Q. Now, then, what was the expression, what was the understanding of the Retailers' Exemption under the 1949 law as it might apply to tire retailing on your behalf and those of other solicitors or counsellors for tire industry companies in Akron upon the passage of this law? That is, what kind of key, how did you think this would facilitate your problem?

A. Well, we felt that, because the law for the first time spoke of what was recognized as a retail sale in the particular industry, we felt confident that Congress had at last given us some legislative guide that was entirely in conformity with the position we had taken with the Department of Labor since 1938. We felt that there was no question as to what—what was a retail sale in the tire industry.

Q. Yes. Now, then, how was it that, as to what you understood the legislative history and antedating law, how was it that the Wage and Hour Administrator was to develop this industry recognition which had been introduced into the law in 1949?

A. Well, it was our understanding that following the passage of the law the Wage and Hour Administrator was

418 going to attempt to determine by investigation in the various industries what a particular industry considered as a retail and a wholesale sale.

Q. Yes. In point of fact, were any investigations or studies of that sort made shortly after the effective date of the '49 amendment as regards the tire industry and its practices?

A. You mean by the Administrator?

Q. By the Wage and Hour——

A. As far as we know, none.

Q. Do you recall or do you have anything in the file from your file or documents with you to indicate when the first inkling was of an investigation or study by the Wage and Hour Administrator with regard to this qualification under this industry recognition test?

A. Yes. I followed this weekly through the Labor Reports and through Congressional reports from the passage of the Act to see what might be forthcoming that would be of assistance to us in our industry, and the first note which I have in my file was taken from the Wage-Hour Administrator's 1953 Annual Report to the Secretary of Labor.

Normally we get those reports, but I had not received this report as of the date I saw this memorandum.

419 I noticed the memorandum report in a Wage and Hour report, the BNA Service, dated January 25, 1953, and it indicated that the Wage-Hour Administrator in his annual report to the Secretary of Labor had referred to the fact that it was his obligation to make an investigation in the various industries, and that serious difficulties had been encountered in determining just in a particular industry what a retail sale was.

And then a paragraph which the BNA report of January 25th quoted from the Wage-Hour Administrator's report caught my eye.

Q. Would you read that for us, please?

A. (Reading) "In such industries clear lines of demarcation between sales which are recognized as retail and sales which are not so recognized often do not exist, or if they do exist, are not readily ascertainable. In such cases determinations can be made only on the basis of careful and extensive findings of fact relating to the entire industry. Even on this basis, however, it is recognized that the lines drawn may only be approximate. Progress has been made in completing industry studies and for-

mulating determinations in a number of such indus-
420 tries, including automobile, coal, farm implements, farm feed, ice, stationery, and tires."

Q. Speaking of this.

A. (Continuing) "Additional work remains to be done, however, before the determinations can be issued."

That is the end of the quotation.

Q. I take it that it was the mention specifically of tires, of course, that caught your eye?

A. Yes.

Q. And the document is the transcription of that, of the memorandum, is that correct?

A. Right.

Q. Would you make that an exhibit to your testimony, please, sir?

(Thereupon said document was accordingly marked as Defendant's Exhibit G, and same was filed among the exhibits in the cause.)

Q. Now, then, Mr. deBruin, that which has just been marked Exhibit G mentioned that some progress had been made by the Administrator, or some steps, at least, had been taken, or words to that effect, in relation to the tire industry, along with the coal and ice and farm implements and other kind of industries.

421 Had you been aware of that at all?

A. No.

Q. Had you been informed of any studies?

A. No.

Q. Or investigation?

A. No, neither I nor, I determined by subsequent conversation with representatives of the other three rubber companies, no one of us had even known that there was an investigation going on.

Q. Yes. And from the list of industries mentioned in what is now the Exhibit G, is there any pattern of activi-

ties of sales that follow or duplicate each other in those named industries, coal and farm implements and tires?

A. I am not particularly aware of consumers' practices in the other industries, but it did not seem to me that there was particular relationship between those other industries and the rubber industry.

Q. Now, as a result of having become aware of this 1953 Annual Report by the Wage and Hour Administrator in which a study of the tire industry was mentioned, did you take any steps to prepare for such study or to offer what you thought was the industry's obligation, perhaps, in connection therewith?

422 A. Yes, I did. I discussed with Mr. Henry Brainard, an attorney representing Firestone, and Mr. George Kilmon, an attorney and I think Assistant Secretary of B. F. Goodrich Company, also talked to Mr. Ray Shaffer, General Tire Company attorney.

As a result of our conversation, Mr. Kilmon got in touch with Mr. Goldberg—Mr. Joseph Goldberg, a representative of the Department of Labor, and indicated to him our interest and our willingness to cooperate in any study of the rubber industry practices.

Q. Could you give us the date of the letter of communication to this Mr. Joseph Goldberg of the Wage and Hour Administrator's office?

A. Yes. There was no letter to Mr. Goldberg. Mr. Kilmon had another matter before Mr. Goldberg in Washington at that time, and my notes indicate that Kilmon talked with Mr. Joseph Goldberg at the Department of Labor and indicated the industry's interest in any such hearing on March 3, 1954. And in my file I have a copy of a letter which Mr. Kilmon received back from Mr. Harry Weiss of the Department of Labor under date of March 31, '54, in which Mr. Weiss for the Department of Labor invited the interest of the tire industry.

423 Q. Yes. Did that letter from Mr. Weiss dated March 31, 1954, refer to any prior or continuing studies by the Wage and Hour Administrator of the tire industry?

A. I have a copy of that letter here.

Q. Well, would you make it perhaps an exhibit? We will just make it an exhibit.

A. I will be glad to.

Mr. Mitchell: An exhibit to your testimony. I think that will be Exhibit H.

(Thereupon said document was accordingly marked as Defendant's Exhibit H, and same will be found among the exhibits in the cause.)

Q. Thereafter did the attorneys for the four tire companies in Akron confer about this invitation to submit information to the Wage and Hour Administrator's office?

A. Yes; yes, sir.

• • • • • • • •

426 Q. Now, then, after this invitation from the Administrator's office in March, I think you indicated, Mr. deBruin, that there were conferences held. Did one of the members or one of the attorneys there in Akron advise Mr. Weiss on or about April 8, 1954, of the intention to submit the memoranda which would set out the industry classification or recognition of retail sales and other pertinent matters?

A. Yes, Mr. Kilmon, the Assistant Secretary at Goodrich——

427 Mr. Mitchell: Yes.

A. (Continuing) ——wrote Mr. Weiss——

Q. Wrote Mr. Weiss?

A. ——to that effect.

Q. And then, thereafter, do you have a letter from Mr. Weiss dated April 16, 1954, which indicates that they would like a joint memorandum from the tire industry

attorneys more promptly than previously planned or intended?

A. Yes, I have a copy of letter, sir, from Mr. Harry Weiss to Mr. G. T. Kilmon under date of April 16, '54.

Q. Would you make that an exhibit, please, sir?

(Thereupon said document was accordingly marked as Defendant's Exhibit 1, and same will be found among the exhibits in the cause.)

Q. Now, pursuant to the letters already in the record and discussion back and forth in Akron, in July '54, was a joint memorandum prepared on behalf of the four tire companies in Akron and submitted to the Wage and Hour Administrator's office at Washington?

A. Yes, sir.

428 Q. Do you have a copy of that joint memorandum with you at this time?

A. Yes, sir.

Mr. Ray: Just a minute.

A. (Continuing) I believe I have a copy of the memorandum. Yes, Mr. Mitchell, I have in my hand a copy of memorandum by B. F. Goodrich, Goodyear, General and Firestone of what is recognized as retail sales in the tire industry. Attached to this memorandum were exhibits from each of the four companies. That was submitted—I don't have the date; it was sometime about mid-June, I believe, or mid-July, 1954, to the Wage-Hour Division.

Q. Would you make that an exhibit. First, would you refer to the conclusion, I believe, there of that memorandum and state what the definition is for retail sales classification, or retail sales, as it appears there in that memorandum expressing the opinion of the four signatories on behalf of each of their companies?

A. Yes, in that concluding paragraph we said:

"We further submit that for more than twenty years

the tire industry has uniformly recognized that sales for resale are wholesale, and that sales of tires to
429 consumers are retail irrespective of the character of the purchaser, the use to which the tires will be put, the quantities purchased, or the price paid for such tires. This uniform recognition antedates the passage of the original Fair Labor Standards Act, continued after the passage thereof and up to the time of the 1949 amendments, and has continued since such amendments to the present time.''

Mr. Mitchell: Would you have that marked, please, as Exhibit J?

(Thereupon said document was accordingly marked as Defendant's Exhibit J, and same will be found among the exhibits in the cause.)

Q. Now, then, you mentioned that accounting records and documents were——

First, I think copy of this '54 memorandum that is now in the record is not signed. It goes without saying of course, that that is a copy. The original was signed by each attorney?

A. The original was signed by each of the attorneys whose names appear on it.

Q. And were there, as mentioned in that memorandum itself, were there exhibits made and attached to it
430 which were comprised of accounting documents, particularly with regard to store operations for each of the four companies identified in that memorandum?

A. Yes.

Q. Do you have the exhibit that was attached to that memorandum by you on behalf of the Goodyear Tire & Rubber Company which sets out its accounting forms and a note or two about its accounting practices?

A. Yes, it is in the Goodyear exhibit.

Q. And does it contain things exemplifying the definition of retail sales which I just asked you to read from the conclusion of the memorandum?

A. Yes, we pulled from our records as much as we could of various original documents. I think the earliest goes back to '34, and continuing right on up to the date this agreement was submitted.

Mr. Mitchell: Yes.

A. (Continuing) It demonstrates that.

Q. Would you make that which was an exhibit to your '54 joint memorandum now as exhibit to your testimony?

A. Yes.

(Document examined by counsel.)

(Thereupon said document was accordingly marked
431 as Defendant's Exhibit K, and same will be found among the exhibits in the cause.)

Q. Now, then, Mr. deBruin, we have already taken the deposition of representatives of the other three tire companies. I will ask you to refer to them and to the exhibits attached to those depositions. And first I hand you the deposition to Ted Curry, an executive of B. F. Goodrich Company, not yet read in this record, but I want you to refer to the gray-bound Exhibit number 5 to Mr. Curry's deposition and tell me whether or not—just that one—whether or not that Exhibit number 5 to the Curry deposition is the accounting exhibit that was attached to the joint memoranda in 1954 which now is made Exhibit J to your own testimony.

A. I believe it to be.

* * * * * * * *

434 Mr. Ray: There is really no issue about what the industry's position is, Your Honor. We are not claiming there is not.

Q. Mr. deBruin, will you further identify this which has been made Exhibit 1 to the Zaveson deposition as

having been an additional exhibit attached to and filed with the joint 1954 memorandum to the Wage and Hour Administrator?

435 A. I believe it to be.

Q. And with respect to the Hinderscheid—H-i-n-d-e-r-s-c-h-e-i-d, would you identify the exhibit to that deposition in the brown cover entitled Firestone Exhibits to be the fourth accounting records that were attached as an exhibit to the '54 joint memorandum?

A. I believe it to be.

Q. Now, Mr. deBruin, after the '54—in '54—the joint memorandum and the four accounting exhibits you have just identified, one from your own company, one from each of the other three Akron companies, around in July of '54, was there any action or any activity on the part of the Wage and Hour Administrator with reference to inviting conferences and doing anything about a study of the industry's practices with respect to the tire industry?

Mr. Ray: If he knows.

Mr. Mitchell: What about——?

Mr. Ray: If he knows or not.

Mr. Mitchell: Well, was communicated to him or he was made aware of it.

A. We heard nothing from the Wage and Hour Administrator's office following submission of our joint brief until June 12, 1958.

* * * * * * *

436 Q. Now, then, Mr. deBruin, you indicated that in June of 1958 you were made aware of some action on the part of the Administrator with respect to an industry study on retailing of tires?

A. Yes.

Q. How did that come to your notice, and what was the date?

A. Under date of June 12, 1958, I received a letter from William B. Grogan, Assistant to the Wage-Hour
437 Administrator, enclosing copy of proposed determination which he said had been published in the Federal Register of June 6, 1958, and indicated that interested parties had thirty days to present any data, views or arguments to the office. He also attached copy of press release.

Q. Would you make copy of the Federal Register, which I believe you have there, and Mr. Grogan's letter Exhibit P, I think it will be?

A. This is Federal Register of Friday, June 6, 1958, photostatic copy of which was attached to Mr. Grogan's letter of June 12.

Q. All right. Would you make that cumulative Exhibit P, please?

(Thereupon said documents were accordingly marked as Defendant's Cumulative Exhibit P, and same will be found among the exhibits in the cause.)

Q. On reading the proposed regulations as appeared in June, 1958, did it appear that the Wage and Hour Administrator had given any consideration or taken into account the industry's viewpoint in preparing such proposed regulations?

A. No, there was no such indication.

438 Q. What next did you or did the Akron tire company attorneys do about this matter?

A. The four attorneys representing the four companies that had been parties to the original memorandum wrote a letter to William B. Grogan under date of July 2, 1958. I have a copy of that letter here.

Q. What was the purpose, to request a conference, or what?

A. Yes, we requested that before a determination was made a conference of the interested parties be held with

the Administrator to consider the data, views, and arguments which we had presented.

Mr. Mitchell: Yes.

A. (Continuing) ——which we were presenting.

Q. And in response to that letter and in connection therewith, was there such conference held in Washington on or about September 4, 1958?

A. Yes.

Q. Could you tell me from notes or memoranda in your file the outcome of the conference or what action was taken at that time?

A. Yes. Mr. George Kilmon, representing Goodrich, Mr. Harold Mull, who was a replacement for Mr.
439 Henry Brainard at Firestone, Mr. Ray Shaffer and I met Mr. Joseph Goldberg at his office at the Department of Labor on Thursday, September 4, 1958. Mr. Goldberg had with him an associate, a Mr. Jacob Rubenstein, Mr. Harry A. Tuell, solicitor for the Department of Labor, I believe, at that time, and Mr. Hammerman, who were all participants in our conference.

Q. And were the proposed regulations that had appeared in the Federal Register in June, 1958, discussed at this conference between the tire manufacturing representatives and the gentlemen from the Wage and Hour office you have just named?

A. Yes.

* * * * * * *

446 Q. Will you make the memorandum, since we don't want to go into the details, but so that we can have them available—make your memorandum of this September 24, 1958, meeting at Washington an exhibit to your testimony?

A. This is my notes.

(Thereupon said document was accordingly marked as Defendant's Exhibit Q, and same will be found among the exhibits in the cause.)

447 Q. Now, then, after you have had the conference in September, 1958, in Washington, did the four attorneys for the tire companies with their main office—home office in Akron submit a further joint memorandum in letter form dated on or about October 9, 1958?

A. Yes.

Q. Does that reaffirm or express again the industry's recognition of retail sales and a re-conveyance of the need for the Administrator to observe same in amending his proposed regulations?

A. That is true.

Q. Will you make that an exhibit to your testimony?

A. This is the exhibit——

Q. And that which you made joint letter memorandum of October 9, 1958.

A. Yes.

* * * * * * *

450 Q. All right. Now, then, after submitting what now is Exhibit R to your testimony, the joint letter of October 9, 1958, that you just detailed along, I believe you got an acknowledgment of that joint letter, then, about October 21?

A. Yes.

Q. (Continuing) From someone on the Wage and Hour Administrator's staff. And then from a Clarence Lundquist you received a letter, did you not, dated November 25, 1958?

A. Yes.

Q. Does that identify what title Mr. Clarence Lundquist then had with the Wage and Hour Administration, sir?

A. Yes, he was Administrator.

* * * * * * *

451 Q. The Department of Labor there, and under date of November 25, 1958, and signed Clarence Lundquist, and I think—I believe it is typed on the paper

below that he is Administrator, is that correct, Mr. deBruin?

A. Yes.

Q. The letter, then, speaks for itself. And would you make it Exhibit S, I believe?

A. This is that letter.

(Thereupon said document was accordingly marked as Defendant's Exhibit S, and same will be found among the exhibits in the cause.)

452 Q. Now, then, Mr. deBruin, after receiving the letter in November, '58, from the Administrator of the Wage and Hour office, was any further request made for information from the tire companies through their attorneys, or any further conferences held, or anything else done in connection with the proposed regulations concerning tire retailing by the Wage and Hour Administrator's office?

A. I heard nothing further from any representatives of the United States Department of Labor until February 25, 1959.

Q. What then occurred?

A. (Continuing) At which time I received a letter signed by Duane A. Wendele, W-e-n-d-e-l-e, and the title indicated that he was acting administrator. The letter merely enclosed for my information a copy of the determination on how the minimum wage and overtime exemptions for retail and service establishments applied to the automotive tire trade and said these are regulations that had been published in the February 25, 1959, Federal Register and would become effective on March 28, 1959.

Q. Would you repeat the effective date, please?

A. Said they would become effective March 28, 1959.

453 Q. Would you make that letter and the attached photostatic copies about the matter published at that time an exhibit to your testimony?

A. This is that letter. This is it.

(Thereupon said documents were accordingly marked as Defendant's Composit Exhibit T, and same will be found among the exhibits in the cause.)

Q. Now, then, Mr. deBruin, the regulations which appeared in final form in 1959, were, I am sure, compared by you, were they not, with the proposed form of those regulations as appeared in June of 1958?

A. Yes.

Q. Did you notice any changes of any substance or any marked degree?

A. No, sir.

Q. Do those regulations as they appeared in 1959 in final form reflect that any consideration or attention had been given to material offered by you, through you and on behalf of the four tire companies in Akron?

A. No, no attention at all had been paid it.

* * * * * * * *

454 Q. All right, if that is done, may I ask, Mr. deBruin, did you find the adaptation of any lan-
455 guage or any definition in the regulations as they appeared in early 1959 in final form of anything you had submitted to Labor Department there prior thereto?

A. Nothing that we had submitted had been used.

* * * * * * * *

457 Q. Will you state what the industry recognition is? You say it as you know it, according to what you say it is, of a retail sale. What does that classification include?

A. From my experience, a retail sale in the tire industry is a sale for use.

Q. Then any other kind of sales made by persons who sell the tires, then, according to the industry's recognition—then do they make two classes, say one of uses and another kind?

A. Yes, for resale.

Q. Are those the only two classifications that are recognized in the industry, as you understand it?

A. Yes, that has been traditional in the industry.

Q. Now, with regard to national account, if you
458 will, please, Mr. deBruin, according to what you know and understand of the industry's recognition, is the national account transaction a sale at the retail level, that is, by the store that makes the delivery of the merchandise?

A. Well, no, we have never considered the account—well, let me put it this way. If I understand the practice, the practice where the national account operates, and the transaction is handled from the home office of the company with the national office of that account, under most circumstances never involves the retail store at all except as a matter of service, and we have never considered that as actually a sale by that retail store at all. It is a service. And I think under most circumstances the only time the retail store is involved in that and the only compensation they get from it is a percentage for the service which they furnish, not the sale at all by the retail store—never goes through their books, as I understand.

Q. And was this percentage—this discussion of this recognition of the national account transaction by the industry made clear to whomever you conferred with on behalf of the Wage and Hour Administrator in this memorandum in 1954 and in the additional memorandum in 1958 and in the conferences held in '58 in Washington?

459 A. Yes, particularly in the September, '58, conversation we pointed that out so far as the national account deal was concerned.

Mr. Mitchell: Thank you, sir.

**Cross-Examination,**

By Mr. Ray:

Q. Mr. deBruin, is it fair to say, in summary of what you have said, that long, patient, time-consuming and courteous consideration was given by every person in the Labor Department with whom you dealt concerning the problem that they were then faced with to come up with the interpretation of the terms involved in this particular exemption?

A. Is it fair to say that that is accurate. No.

Q. (Continuing) ——what I have just said?

A. No, I don't think it is fair to make that interpretation of it at all.

Q. Well, is it fair to say that time-consuming and lengthy consideration was given to the views submitted by the representatives of the tire industry to the Labor Department?

A. I don't believe so, sir. My interpretation was that no consideration or attention at all was ever given to any views that we expressed.

460 Q. Well, are you influenced by the results rather than whether or not consideration was given or not? In other words, was the test whether consideration was given, whether agreed to or not? I am not sure we can agree with you or not. I am speaking about the fact that whether they listened to you, they responded to your inquiries and spent enough time on a particular problem. You will concede that, won't you?

A. Mr. Ray, I want to be fair in my answer, and it may

involve some conclusions; if you want me to tell you why I arrived at my conclusion that the Labor Department never gave any particular consideration to any material we submitted I will be glad to, but I don't want to offend the Court.

Mr. Ray: I don't want you to.

A. (Continuing) If you want an explanation of my feelings, I will be glad to give it.

Q. No, I am talking about testimony you might have——

A. Yes.

Q. And it seems clear from your testimony, the correspondence and letters here which you have available, the fact that they always answered yours, and say that
461 they will be glad to have any facts that you will submit, item of correspondence after correspondence—and his Honor has seen it, too—they gave lengthy and time-consuming consideration to you, to the views of the industry representatives, as you understand it?

A. No, I don't think they gave any consideration. I will be glad to elaborate and tell you why I reached that conclusion, if you want me to, because I don't think they gave any consideration to anything on file.

Q. Have you read the deposition of the executive secretary of the National Tire Dealers Association?

A. No.

Q. You have not?

A. I haven't read any of these depositions except one of Mr. Davis from Goodyear. I did read that.

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464 **DEPOSITION OF WINSTON W. MARSH.**

* * * * * * *

465 **WINSTON W. MARSH,**

was called as a witness by counsel for the defendant, was duly sworn by the notary public, was examined, and testified as follows:

**Direct Examination,**

By Mr. Mitchell:

"Q. Would you state your name?

"A. My name is Winston W. Marsh.

"A. Mr. Marsh, are we taking this deposition this morning in the Board Room of your offices of the National Tire Dealers and Retreaders Association at 1343 L Street, Northwest, in Washington, D. C.?

"A. That is true.

"Q. Would you state, sir, what your position or title with that Dealers Association may be at this time?

"A. My title is Executive Secretary and General Manager.

"Q. Would you state briefly, sir, what your duties and responsibilities in that position generally consist of?

"A. I am the chief administrative paid staff member. As such I am not an officer per se of the Association, and my responsibilities include the administration of this office, the development of services for our tire
466 dealer membership and a responsibility to our Board of Directors and Executive Committee to carry out such interests as they may find kindred with their own particular businesses.

"Q. Would you summarize briefly, sir, what your education at the college or graduate level may be, bearing particularly in mind our interest in business and on management studies?

"A. At college and graduate level?

"Q. Yes.

"A. I have an A.B. degree from Wittenberg University, Springfield, Ohio. I have done some extension work beyond that; Master of Business Administration, George Washington University, here in Washington.

"Q. Now, sir, the case in which your deposition is being taken this morning concerns a tire dealer who does some retreading and has been and is in the tire business at the merchandising level.

Would you summarize, again fairly briefly, what your background and experience your various positions may have been in the tire industry, and particularly in the merchandising of tires, prior to your coming to this Trade Association?

"A. I started in the tire business in 1930 with an independent tire dealer in Springfield, Ohio. I left
467 them in something less than a year to join the Firestone Tire and Rubber Company. I was employed for some four years working as a store manager and as a field representative.

"Q. May I interrupt please, sir? When you say store manager, does that mean a retail store?

"A. A retail store manager.

"Q. Controlled by your employer, Firestone Tire and Rubber Company?

"A. Yes. Actually, it was in the department store field.

"Q. Thank you, sir.

"A. That was followed by about three years with the Texas Company. At the time I left I was a retail supervisor in charge of company stations as well as some wholesale accounts.

Following that I went to work for the General Tire and Rubber Company, and was a special representative

in the Stores Division, helping stores that were having difficulties.

"Q. Would you state, sir, how long and over what territory your employment by General Tire and Rubber Company consisted?

"A. I think I was at General about two years, and I worked principally—well, I worked out of Akron and Mansfield, mostly out of Akron though.

I followed that by going into business for myself,
468 first for two years in Dayton, Ohio, followed by some ten years in Hamilton, Ohio, and maintained my interest in the tire business up until September of 1950.

In September of 1949 I divorced myself from active interest in the tire activity in Hamilton to come here as General Manager of the Association.

"Q. Just for clarification, you indicated your interest as a proprietor of a tire dealership continued until September of 1950. Am I accurate in thinking that was for one year after you ceased to be actively engaged in that business?

"A. That's exactly right. It was for one year after. It was simply a matter that I came down here not sure of whether I was going to stay. Then there was also the problem of disposing of the business.

"Q. Surely. Then, since your appointment to the position of Executive Secretary of the National Tire Dealers and Retreaders Association in September, 1949, would you outline very briefly the growth and development of that association under your leadership?

"A. Well, membership-wise we are about two-and-a-half to three times larger now than we were at that time. We have purchased this building here and
469 moved in here some two years ago. We operate now in all fifty states and sixteen countries. We

have a staff at the present time of some twenty-one persons, having started with four. There are many ramifications of the Association's operations which have grown in the field of services and publications, and that sort of thing.

"Q. In addition to your full and regular employment as Executive Secretary and office of this Trade Association, do you find time for teaching or for writing or for appearances as a speaker or in other such activities in the tire industry?

"A. Well, sir, this is a pretty busy schedule, but this seems to be very much a part of my activities, and I would guess that I make from fifty to one hundred speeches a year, most of which are within the industry. However, I feel that I have some responsibility outside the industry and so I have made a number of presentations outside the industry and have done some writing outside the industry.

"Q. Have you been able to continue with the academic end of the management field; particularly, do you hold a title on any school or graduate school faculty?

"A. Well, I have done some university lecturing and have functioned under an Associate Professor status
470 at George Washington University and have probably lectured at some six or seven universities throughout the country.

"Q. You have an Associate Professorship at George Washington University. Is this department you work in located here in Washington, D. C.?

"A. Yes, it is. It is principally confined to the School of Government which is their School of Business.

"Q. You mentioned that you made a number of speeches or addresses in the industry. I will ask you if you have ever been called upon as a management consultant by persons or agencies outside the industry for your

appearance or consultation, and if so, when and under what circumstances?

"A. Well, there have been a few. I think around, oh, five or six years ago I flew to Anchorage, Alaska, to be some service to the Air Force in a management program for their officers of the rank of Major and above.

I have also performed in this capacity with other trade associations in other small business groups.

"Q. Have you ever appeared at international conferences in respect to tire merchandising, and if so, would you tell us some of the details of that experience?

"A. Well, in 1957 I believe it was, the Dutch Government paid my way to come abroad as consultant and discuss with them some of their industry problems,
471 and at the same I addressed the International Conference at Baden Baden, Germany. In 1960 I repeated the latter part of that experience by addressing the International Conference at Vienna, Austria, and I have been invited back to Essen, Germany, in May of this year.

"Q. What about publications, sir? You already enumerated a very busy schedule, but have you had an opportunity and have you in fact published some material on the field of tire merchandising or certain aspects of it?

"A. Well, I have written quite a number of articles and trade papers as it specifically relates to tires and tire selling, merchandising and management, and in my capacity here I am called upon to write a great deal of this type of thing. Outside interests have been on a little broader scale and I have contributed to three different books and written one article for the Dartnell Corporation.

"Q. Would you describe what sort of reporting this Dartnell Corporation is engaged in?

"A. Dartnell is, I believe, properly described as a management publication firm which publishes technical manuals. The work I did with them offered sales work at various levels, and part of my research I had done within the industry and part outside.

472 "Q. Have you had other publications in general as opposed to trade magazines or journals?

"A. Oh, actually they are relatively minor roles. There was a publication by the Oklahoma Press that I can recall, and Small Business Management, and I think there has been one or two more. It has been sometime. I am working on one now. This is a matter of most pertinent interest at the time. I can't confess much progress, but we are working on it.

"Q. Now then, sir, are you a member of any professional or service organizations in the management field, and if so, would you tell us what those may be?

"A. I am a member of the American Management Association; the American Institute of Management; the American Marketing Association, I am a past-president of the Washington Chapter of that group. I am a member of the American Society of Association Executives. I believe that covers it.

"Q. All right.

Mr. Marsh, will you tell us something about the background and history of the National Tire Dealers and Retreaders Association, Inc., and first let's start with its organization date?

A. This organization started in Cleveland, Ohio, in 1921.

473 "Q. During the course of its history and development has it broadened its area of membership and operations and changed its name in connection with such broadening?

"A. Well, technically, it has never broadened its

interest. It is still representative of the same group of people, of the same type of merchandisers and merchants as it was then at its outset, although in the course of these years it has changed its name several times, once to include batteries, which was later dropped.

The most recent change was made in November of 1955 when the name which had been one of some standing, the National Association of Independent Tire Dealers, was changed to include the word Retreading, and to keep the name short the word Independent was dropped and the word Retreaders was added to our present name of National Tire Dealers and Retreaders Association.

However, I want to quickly point out, as I do in every case, that this in no way prejudices the group of people we represent. We are still the Independent Tire Dealers.

"Q. And has the continuity of the Association been the same, that is, is the present entity under the present name, National Tire Dealers and Retreaders Asso-
474 ciation, Inc., a successor to and a continuation of the identical association that formerly was known as the National Association of Independent Tire Dealers, Inc.?

"A. That is definitely true. We are a New York chartered Association; it's been continued in exactly that same area.

"Q. Are there other trade organizations that represent tire dealers in this country on a national basis?

"A. We purport and I believe do singularly represent the independent tire dealers of the United States.

"Q. You have already indicated that the membership includes dealers in all of the present fifty states of the United States and several foreign countries. Would you tell us approximately what the enrollment or membership is?

"A. In our tire dealer membership we have some 3200 members. We have an associate type of membership in

the equipment industry which numbers approximately 200, for a total of 3400.

"Q. Now then, sir, as used in the Association, what does this term Tire Dealer in its title or name convey or mean?

"A. This term to us would identify an individual or partnership or corporation whose principal interest would be in the sale of tires. Now it would, of necessity, also embrace those people who would have a very deep, broad interest in the tire industry which might not
475 in the full sense number tires at fifty-one percent or more of their sales.

For example, a petroleum jobber might do a million dollars in oil and gasoline sales and only $300,000 in tires. We would still consider him a very formidable outlet or distribution point for tires. So at the risk of over-simplifying it, I would say that it is someone who has a principal or deeply vested interest in the distribution of tires.

"Q. Now the term retreaders, as I understand it, in your industry, has a particular connotation, and I want to ask whether or not the term, the word retreaders, as it appears in the title of your Trade Association, is used in the general sense to include those who retread or recap or otherwise rebuild tires and not in a particular specific meaning?

"A. Mr. Mitchell, we have made a bit of ado over the thing of the word retreader because we were trying to get rid of the connotation of recapping as was known in World War II when we had dubious materials to work with and so had a great deal of a problem trying to keep America's vehicles operating. But in the full sense of the word, retreading, as such, embraces all of this industry whether it be recapping or any other
476 name which might be applied to it.

"Q. I have noticed from your testimony about the

change of name which I think you placed sometime in 1956, and the dropping of the word independent from the title of your Trade Association; my question is: Does that signify a change in the type of membership that was enrolled or a change in attitude or policy of the Trade Association, or was it simply for brevity and utility?

"A. It represented no change of interest in the least. The changes made in early November, 1955, are the same, and our membership today is as it was then, for the independent tire dealer. Any man controlled by a rubber company is not eligible to membership, and each one of our directors, before being seated as a director, must have a sworn affidavit to the effect that he is an independent tire dealer.

"Q. And as you just stated, I take it the words independent tire dealer is used to distinguish those dealers who are not controlled by a rubber manufacturer from company owned or operated stores?

"A. That is true.

"Q. Would you please name and briefly outline some of the services and functions of this Trade Association by or for its membership?

477 "A. The area of service that we render our membership is broad. In many respects it's probably much broader than the average Trade Association. We find the needs of our membership to be many, and to be brief, I will try to put them in general categories.

First might probably well be the field of management where we are trying to improve the management quality of the independent tire dealer, and have done so by extension schools which we have provided at four levels of teaching. We have an advanced management seminar for tire dealers that is sponsored by the Wharton School of Finance at the University of Pennsylvania. This past

year we had two schools, one at the University of Georgia, and the other one at U. C. L. A. This year there will be put on right here in Washington a training program by the American University.

In the third area we have put on some fifteen to eighteen area or regional type of meetings in which a very broad number of activities are covered at these meetings. The fourth area is a shop training program which is a mobile thing moved from one part of the country to another as the need arises.

We are quite active in the field of publications and
478 have divided our publications into five areas which are, sales, service, shop, warehouse and office, and have published three technical manuals in this field. One that has already been published is in the field of shop procedures or retreading; the second in the field of warehousing tires; and the third in the field of office procedures, and this one has just been released this week. We have published other technical manuals of this type too.

We have published a number of assistants to retreaders in the form of technical bulletins and cost analysis documents whereby he can analyze the cost of his shop operation. We have an inventory control system that we tell about. And these are specifics and things that are tangible.

On the other side we have tried to keep our people familiar with what is going on in the industry, with changes, whether they be technical or just changes in marketing patterns within the industry. And several years ago we created a market research department to assist us in this, and we now have a full-time man whose job it is to keep our people, our members, familiar with what is going on in the various departments of Government so that we can acquaint our dealers with the regu-

lations of the various agencies and departments,
479 and to keep them on the right basis of doing business, and of course, involved with all of this is a certain amount of legislative interest as far as certain bills and matters before Congress are concerned.

"Q. In addition to the particular seminars and advanced study groups and what not which you have already described, I take it there are as well periodic meetings for the membership in regions, districts, or perhaps on a national basis.

My question is: At those meetings, is this education and instruction and keeping the membership up-to-date also carried out?

"A. Well, I am quoting these figures off the top of my head, but in this past year at our convention, at our annual convention, we had 5,600 people. At our regional meetings last year we had something less than 2,000. At our advanced seminars we had something like 200, and at our retreader training schools we have probably had 150, which totalled up makes a rather broad area of contact with our membership.

And while the training school program is dedicated to shop procedures, the other four programs, however, do cover a very broad area of interest, whether it be a new system, a better way of keeping records, or
480 new management procedures, or new income tax requirements covered this past year, so we do try very desperately to keep our members as fully informed as we can.

"Q. Mr. Marsh, would you state please, sir, how sales are classified in the tire industry and particularly in your T[illegible] Dealers Association with regard to retail sales and non-retail sales, and what goes into each category?

"A. Would you repeat that question again?

"Q. Yes, sir. I am asking for a classification of sales

in the tire industry as recognized by your Trade Association of tire dealers as to retail sales and non-retail sales, and the components or constituents of each class.

"A. Sales are basically divided as either retail or wholesale, and in the terminology in general usage in the tire industry a retail sale is a sale made to a consumer or user, whereas a wholesale sale is a sale made to someone who intends to use these products for purposes of resale.

"Q. Now then, in line with that classification I take it by your statement that all sales are broken down into two categories, either retail sales, which are those to consumers or users, and wholesale sales which are those for resale; is that correct?

481 "A. I am not sure that every tire dealer breaks that down in these two ways, but I would say that in general usage that these would be very accepted procedures by the average tire dealer.

"Q. Now then, in connection with the sales that are classified as retail sales, namely those to consumers or users, I will ask you whether or not other factors such as the volume of the sale, the repetition of sales to the same purchaser, the discount at which the sale may be made, the character or personality of the purchaser, I will ask you whether or not any of those factors enter into the classification of a sale as a retail sale.

"A. Well, in my opinion, this would have very little effect on the tire dealers' classification of the sale because in the majority of the States in the United States, they must classify a sale to a user for sales tax purposes, so as a result it is a very natural thing for him to consider that a sale that he makes, regardless of discount or price or quantity or anything else, either goes to a user who must pay tax, or to a wholesaler who would be, therefore, tax exempt and would qualify with some exemption certificate.

"Q. And would you state, please, sir, whether or not this classification for sales tax purposes that you
482 have mentioned does or does not duplicate the classification in the tire industry apart from the sales tax laws?

"A. I suppose in the full sense of the word this is true. It is hard to say which came first. I would be inclined to think that the tire dealers' analysis of it came first and sales tax analysis of the various States came second. Regardless which was the primary motivating force here, this is pretty deeply imbedded in the minds of the tire dealers.

"Q. Would you state what the term 'retail establishment' means in the tire industry and particularly as used by your own Trade Association.

"A. Well, with very few exceptions, and I emphasize very few, I would consider the great bulk and majority of our membership to operate retail establishments inasmuch as they offer tires for resale and therefore I would logically assume, I believe, that they would therefore be retail establishments.

"Q. I believe your statement was that they offer tires for resale.

"A. At retail; I'm sorry.

"Q. So that your statement as you intended to make it was that since they offer tires at retail——
483 "A. Tires at retail.

"Q. That is the classification of a retail establishment according to the context of your answer?

"A. Yes, sir.

"Q. Mr. Marsh, you indicated a short while ago in your testimony that one area or aspect of your Trade Association's service to its membership was keeping posted on legislation or bills, and trying to inform the members as to the regulations or directives by the various

agencies of the Federal Government which might or could affect tire dealers.

I will ask you whether or not, sir, in connection with that, this Association entertained an interest in and participated in any way in respect to the 1949 Amendments to the Fair Labor Standards Act.

"A. Well, I became acquainted with this Amendment almost from the first day I came here, having arrived here in September of 1949 I found myself faced with this problem not many months afterwards, and it was probably one of the first, if not the first, matter of Government activity to which we addressed ourselves.

"Q. And in that connection, sir, I will hand you a
484 letter which is a copy from your file, apparently, which went out over your signature to the Administrator, Wage and Hour Division, Department of Labor, Washington, D. C., under the date February 21, 1950, and ask you if you identify this as a true copy of a letter that you wrote on the subject of the Fair Labor Standards Act or the Wage and Hour Law?

"A. Yes. This is a letter from our office dated February 21, 1950.

Mr. Mitchell: I will ask that that be marked as Exhibit A to Mr. Marsh's deposition.

(Whereupon, copy of letter being 5 pages was marked Defendant's Exhibit A, for identification.)

(Defendant's Exhibit A, for identification, was thereupon exhibited to counsel.)

By Mr. Mitchell:

"Q. Now then, sir, would you glance at that as you feel the need to and tell me whether or not from your recollection that was the first communication addressed to the Wage and Hour Division in respect to the changes that had been made under the Fair Labor Standards Act in 1949 in respect to rulings or regulations which you

considered were to be issued by the Wage and Hour Administrator?

485 "A. Well, to the best of my knowledge this is our earliest bit of correspondence on this subject.

"Q. Now then, sir, would you turn to the last paragraph, I believe it is, of that letter, and see if you find an offer in it by you to provide further information or to have conferences or do whatever the Administrator saw fit to request in line with the recommendations and requests stated in your letter?

"A. Well, in the last paragraph here we state:

"We will be glad to supply you with further information or aid in this connection."

"Q. Do you recall whether or not, sir, there was any request made in line with your offer, that is, if conferences were held or if requests for further information came back to you from the Wage and Hour Administrator within a short period of time?

"A. Well, this is going back a good many years to draw on one's memory. I believe that there were several informal office conferences in the next—shall I say several years, but I don't recall any formal activity such as is represented by this letter, for what I would call a considerable period of time.

"Q. Well, I hand you a letter addressed to you

486 as general manager of this Association as it was then known, which has a stamp date of December 15, 1950, and is over the signature of William R. McComb, Administrator, and I will ask you if you recall receiving this and if it is your present recollection that that may have been the next document or correspondence in the chronology of this Wage and Hour ruling?

"A. Oh, yes, this is the acknowledgment. Yes, it says here:

"Already available for this purpose is your letter to me dated February 21, 1950 . . ."

Oh, yes, I remember this. This is December 15, 1950. This is later the same year. And in this one he has some fifteen questions.

"Q. And would you have the court reporter mark this as Exhibit B in your testimony, please sir?

(Whereupon, letter of Dec. 15, 1950, addressed to witness was marked Defendant's Exhibit B, for identification.)

(Defendant's Exhibit B, for identification, was thereupon exhibited to counsel.)

487 By Mr. Mitchell:

"Q. Mr. Marsh, as you indicated and as is apparent from inspection, this December 15, 1950 letter to you from Mr. McComb, the Administrator, makes a request for answers to some fifteen questions attached to Mr. McComb's letter, with the direction that your statement of the answers should be addressed to a Mr. Max Schiferl, Acting Director, Division of Research and Statistics, Department of Labor.

I will ask you, sir, if this document that I hand you now, addressed to Mr. Schiferl, dated January 19, 1951, is a file copy of your letter in reply to Exhibit B, and if attached to it is a copy of your answers to the fifteen questions stated in the attachment to Exhibit B?

"A. Yes. This letter dated January 19, 1951, is in answer to the request shown by—I think you call it Exhibit B.

"Q. Would you have that document which you have just identified made Exhibit C in your deposition, please, sir?

"A. Yes, sir.

(Whereupon, copy of letter to Mr. Schiferl of Jan. 19, 1951 was marked Defendant's Exhibit C, for identification.)

(Defendant's Exhibit C, for identification, was
488 thereupon exhibited to counsel.)

By Mr. Mitchell:

"Q. Mr. Marsh, I find in the last paragraph of the letter of January 19, 1951, now made Exhibit C to your deposition, the statement:

"You can be sure that if there is further information or other material that we can bring to light which will help you, we would be pleased, not only to come to the Department of Labor for any conference that you might want held, but to develop further information which might help you get a clear picture of the retail tire industry as we know it."

From your present recollection, sir, will you state whether or not at any time soon after January 19, 1951, any such conference was held or any further information was solicited by the Wage and Hour Division in respect to the information stated in your answers attached to Exhibit C, or in respect to the tire industry in general?

"A. As I indicated earlier, we had a number of informal conferences with the Department of Labor. Some of these were conducted over telephone and some were personal conferences. However, as I indicated earlier,

my recollection of any vigorous activity in this
489 area is to the effect that there was no major activity for quite sometime, possibly two, three years.

I might add, however, that in that same period of time that I do very distinctly recall that we pursued every case that we could hear of or learned about of tire dealers who were engaged in any controversy with the Department of Labor, to ascertain why, how, any of the facts that we might be able to get together to really reaffirm in our own mind that our views on this subject were proper and correct.

"Q. But while I take it from what you just said there was continuing activity by the Department against the

individual, I take it individual members of your Association—my question actually was directed to any continuing activity of the sort exemplified by your Exhibits A and C, namely, the submission of facts in whatever form to the Department of Labor's Wage and Hour Office in Washington.

"A. To the best of my knowledge, I don't recall submitting anything in written form to the Department of Labor for a considerable period of time after that.

"Q. Can we take it from that recollection that there was no request for any further information which was denied?

"A. I fear that in answering this I would have to draw an assumption, and that is, if we had such a
490 request we would have quickly filled it.

Mr. Ray: We will stipulate that Mr. Marsh has been very cooperative with the Labor Department in all the various facets of this problem.

Mr. Mitchell: Thank you very much. I am sure the witness appreciates that as well as myself.

By Mr. Mitchell:

"Q. Mr. Marsh, I hand you here a document which appears to be a copy of a letter over your signature dated July 30, 1954, addressed to a Mr. Harry Weiss, Assistant Administrator, Wage and Hour and Public Contracts Division, United States Department of Labor, and attached to it is a memorandum of the National Association of Independent Tire Dealers, Inc., on what "is recognized as retail sales" in the tire industry, which memorandum is dated July 30, 1954, and the copy, from the copy I hand you it appears that this memorandum also went out over your signature as Executive Secretary of this Trade Association.

I ask you if you can identify that as a true copy of the letter and memorandum described?

"A. Before answering this, I'd like to ask counsel if I may make an addition to my earlier testimony regarding contact in these matters.

491 "Q. Oh, by all means, at this time or at any other time, if you would like to elaborate, feel free to do so.

"A. The letter of July 30, 1954, deals with the problem of retail sales as they are known within the industry, and in fairness I would like to state that to the best of my knowledge we had resolved the first part of a two-part problem, the one of the classification of retreaders, as a service, and that this was accomplished not long after the questionnaire was returned to the Department of Labor. This has been handled so long ago, and it was not a matter of great controversy. We were able to present the industry's views on retreading and they were accepted basically as they were presented, and retreading was classified as a service industry, which I believe is covered as one part of one of the earlier exhibits which I looked at.

The second part comes back here in July of 1954 and this is the additional information which we supplied on that particular problem.

"Q. Well first, before we actually identify that exhibit that you now have before you, let me make a statement for clarification, with your permission, sir, and obviously, check me if I am inaccurate.

492 Your reference to answers that you submitted to the Department of Labor was to what we now have had marked as Exhibit C to your deposition; is that correct?

"A. It was a question which was posed in the first letter of 1950.

"Q. For record purposes, can we follow that continuity through by referring to exhibits as to their letters?

"A. It was material dealt with in part one of the letter of February 21, 1950.

"Q. Which now is marked as?

"A. Exhibit A.

"Q. And that question you say——

"A. Somewhere in this period of time, not long after this exchange of correspondence now known as Exhibits A, B and C; it was resolved somewhere in that area of time.

"Q. Right.

"A. The matter of retail sales went on in a continuing thing and comes back here in my memory of this letter of July 30, 1954.

"Q. But the first part, with regard to the vulcanizing and recapping services, was resolved prior to July 30, 1954, in some manner consistent with the Trade Association's presentation of that problem and of the
493 nature of that problem in your Exhibits A, B and C?

"A. Well, let me answer that in two ways. One, as I recall it, it was resolved very near the date of 1951, somewhere in that area. It was early in that period of time.

Two, it was certainly resolved to our satisfaction because it was in a matter as we saw it and as we felt the industry saw it.

"Q. Right. Now then, sir, would you mark this letter and memorandum both bearing the date July 30, 1954, as Exhibit D to your testimony?

"A. Yes, sir.

(Whereupon, copy of letter with memorandum was marked Defendant's Exhibit D, for identification.)

(Defendant's Exhibit D, for identification, was thereupon exhibited to counsel.)

By Mr. Mitchell:

"Q. Mr. Marsh, I hand you a letter dated August 9,

1954, over the signature of Verl E. Roberts whose title was Acting Assistant Administrator, addressed to you as Executive Secretary of the Trade Association, and I ask you if that is the reply to the letter and memo-
494 randum of July 30, 1954, which now has been marked as your Exhibit D?

"A. That is true.

"Q. Would you have that marked as Exhibit E, please, sir, to your deposition?

"A. Yes.

(Whereupon, Roberts letter of Aug. 9, 1954, was marked Defendant's Exhibit E, for identification.)

(Defendant's Exhibit E, for identification, was thereupon exhibited to counsel.)

By Mr. Mitchell:

"Q. In the last paragraph of the letter now made Exhibit E to your deposition, the phrase appears:

'If upon completion of our analysis, additional information or clarification is necessary, we shall take advantage of your office of further assistance.'

In view of the stipulation already of record with regard to your cooperation with the Department of Labor in respect to these regulations, I want to ask you whether or not any such request may have been made, if you remember, what conferences or discussions, if any, took place after August 9, 1954?

495 "A. Well, over the period of the next couple years there were several conferences. I am in no position to tell you how many or at what intervals they might have been. As I recall it, however, there was little activity again for some period of time, until such time as the present ruling dealing with retail sales came out, when there were several conferences held about this matter.

"Q. Do you recall, sir, about when the rulings under

the 1949 Amendments to the Fair Labor Standards Act which particularly affected tire dealers may have been published or may have first been circulated?

And I recognize you couldn't remember as to a particular day or month, but about when, if you can recollect.

"A. Well, let's see. I believe it was around 1958. Whether that was the year it appeared in the Federal Register or not I can't say, but it was approximately that time.

"Q. At the time of the appearance of these regulations pertaining particularly to the tire dealers, do you remember what activity your association engaged in, in respect to those regulations?

"A. May I ask, do you mean previous to the issuance of the regulations?

"Q. Previous to, if you recollect, sir, or at the time
496 of, or in consequence of.

"A. As I remember it, it was a conference in the office of Mr. Goldberg, at which time——

Mr. Ray: You had better specify which Goldberg. We have two Goldbergs over there now. One we call Senator Goldberg and the other is Secretary.

The Witness: This is Joseph Goldberg, I believe. At which time a rough outline of a proposal was made which would give some interpretation of certain types of sales, principally the commercial type of sales within the industry.

We found this preliminary proposal so much to our disliking that there were several conferences held on this matter from time to time. We objected strenuously to the matter of price and quantity being determining factors in the issuance of a regulation in the tire industry, for reasons that were explored in great detail at that time.

This matter was discussed, and there were quite a number of people from time to time that participated in these conferences. As I remember it, a second proposal was drawn and while this was an improvement, we still protested vehemently on the grounds that we felt that the quotation of the law, and this is stated in our
497 various documents, 'as recognized in the industry,' was thoroughly and clearly understood by tire dealers over the country, and that to our way of thinking should solve the problem or the thing that was to be accomplished by the Department of Labor.

As I remember it, we were told at the time that it was felt that something more specific had to be spelled out and so, as I remember it again, at a later conference, a proposal was submitted to us which we carried back and studied with staff people, our attorneys and some selected tire dealers, and we recommended, as I remember it, a few changes in it.

We again restated our position on this matter of industry interpretations but it was quite clear at the time, and I don't think this is in the least disputable, that there was going to be some sort of regulatory measure. And inasmuch as we had no choices really as to what we felt should be done with the thing, because we were endeavoring to cooperate with the Department of Labor and do everything we could to be of assistance, we made such recommendations in keeping with the proposal that they had made, as we felt might be helpful, and as I recall it, they accepted every one of these proposals that we made, and it was on that basis that the order came out.

498 We were notified by telephone, I believe, that it was in its final form and that it would be published in the Federal Register at a later date. It didn't appear quite as soon as we thought, but later it did appear, and

we gave it attendant publicity in our publication and did everything we could to bring the thing to the attention of the tire dealer.

"Q. Now then, sir, you have indicated that you conferred prior to the publication of these regulations on one or more occasions with a Mr. Goldberg, and for the record, is that the same gentleman Mr. Goldberg seated at this table while this deposition is being taken?

"A. That's the Mr. Goldberg.

"Q. Now then, sir, in your opinion did the regulations pertaining particularly to tire dealers reflect the industry's recognition or definitions of terms as they did appear, and as those regulations did appear in final form?

"A. Would you restate that question?

"Q. Yes. I am asking whether or not the regulations under the Fair Labor Standards Act, as amended in 1949, in the form those regulations finally appeared, I am asking whether or not those regulations reflect the
499 industry's recognition and the same definition of terms as are used in the industry?

"A. No, this is not as recognized in the industry. This was a compromise which was explained to us was a matter of interpretation which was to be required, but I don't believe we ever changed our position from the very beginning that the phrase, "as recognized in industry," which we have used many, many times, is clear and definable and without problem.

"Q. In line with that last comment that the position is unchanged, I hand you that which appears to be a typical accounting sheet for summarizing sales or other income, and I will ask you first, sir, if you can tell me what it is and when it is used, and what purpose it is used for.

"A. Yes. Well, this is a financial statement of a tire dealer member of this Association. This is for the year

1953. The name has been deleted and it is identified only as a Middle West Tire Dealer from a medium-sized community.

We used several of these this year in a series of meetings which numbered approximately fifteen or sixteen across the country to try to help tire dealers in the
500 operation of their business. This was obviously in the year 1954 because these were current at the time. This is a thing which we have done before.

"Q. Am I correct in thinking when you say you have used that at several meetings that that which you hold is a photostatic copy of an exhibit or of a chart that is part of a program presented for meetings at your dealers?

"A. This was mimeographed and distributed to the tire dealers that attended the meeting, this and other exhibits so they might take them home. We thought these were worthy of study. We give them copies of financial statements to take back to their own community to study and compare with their own statements and this is one of these.

"Q. Would you have that marked Exhibit F to your deposition, please?

"A. Yes, sir.

(Whereupon, photostat was marked Defendant's Exhibit F, for identification.)

(Defendant's Exhibit F, for identification, was thereupon exhibited to counsel.)

By Mr. Mitchell:

"Q. Now, sir, would you state, with regard to Exhibit F, whether or not sales are classified in any way
501 on that exhibit, and if so, what the classification is?

"A. On this particular exhibit we have new passenger tires differentiated from new truck tires and again differentiated from used tires. This firm also sells

mechanical goods, miscellaneous merchandise, and has services such as wheel balancing and alignment and has a service and paint department.

In addition to that, they have done what we call a further breakdown within a department and have broken their new passenger tires and new truck tire sales down between retail and wholesale.

"Q. And as you construe that exhibit, does that breakdown of new passenger tires and new truck tires between retail and wholesale sales reflect the definition that you stated a while ago in your testimony, namely, that sales for resale are wholesale, that all other sales are retail?

"A. I have every reason to believe that I could clearly identify any ticket or invoice of this company as defined in this operating statement.

"Q. And would you state whether or not, although that appears to be taken from some companies accounting statement for the year 1953; my question is whether or not that reflects the current interpretation of your
502 Association with regard to the classification just discussed.

"A. I would be reluctant to answer that in its full text inasmuch as we now have a problem of a completely new and different interpretation with the Department of Labor as to the difference between the retail and wholesale sale, and just what tire dealers are doing to further extend their bookkeeping and accounting procedures to reflect this, I can't say.

I could say that as far as the tire dealers are concerned, if we were to have a meeting tomorrow of tire dealers and were to talk about retail sales as against the wholesale sales, we would not have the problem of definition between the two areas.

"Q. And Exhibit F reflects this common recognized definition you just referred to?

"A. To the best of my knowledge, it does.

"Q. Now then, sir, after the regulations in final form under the Fair Labor Standards Act, as amended in 1949 were issued, and by regulations I mean those pertaining particularly to tire dealers, what was the reaction of the members of your Association to such regulations and what interest or what economic problem did they have with respect to compliance with same?

"A. Well, unfortunately I fear that the reaction
503 was practically nothing.

"Q. Can you explain why there was little or no reaction at the time of the appearance of these regulations?

"A. I should qualify that statement by saying I have no knowledge of what correspondence the Department of Labor may have had to their publishing of these proposed regulations in the Federal Register. They may have received correspondence of which I am not familiar. But to my knowledge, there was little or no reaction.

The problem rests with the fact that as we tried to explain these new regulations at meetings, the best we can hope to do is to reach some fifteen communities in the United States with a limited amount of time to explain this along with some of the other problems which would be timely at the moment, and that you're probably only reaching one-third of your membership, and unfortunately there are some outside who were not members of our Association.

So that this doesn't give you a very wide exposure. There is also a tendency at these meetings to get your larger tire dealers, and many of them are in metropolitan areas where they have organized labor, and as a result, they have problems of record-keeping and payment of wages which they have already dealt with on a different
basis, but which solves maybe more than one prob-
504 lem, but it does leave a large group of people in some substantial areas who did not get the benefit

of this thinking, and who probably aren't as devout about reading their mail and the correspondence and the printed matter that comes to them as they should be.

Then there is, of course, the smaller tire dealer who can't travel to an area two or three hundred miles away to attend such a meeting, and he is generally so busy he reads nothing that is sent to him. So your problem is one of exposure in a matter of this kind.

"Q. Well, with regard to the larger tire dealers who can and do take advantage of the meetings your Association holds, you have indicated that perhaps there was submerging of the problem under these regulations in a union contract or labor bargaining agreement.

Would you explain please, sir, how that would operate, that is, how this submerging would take effect?

"A. Well, if a man is a larger tire dealer and in a community that he might find himself with organized labor, then the chances are that his wages for the most part would comply in every sense with the require-
505 ments of the Fair Labor Standards Act, and in order to do the record-keeping, which is required in a union contract, he would also be able to comply with the record-keeping requirement of the Fair Labor Standards Act, and so that whatever small difference might be left over with such an arrangement, he would find the easiest course of action would be to put his whole organization under such an arrangement and handle it on that basis.

"Q. What about the labor cost of tire dealers in the larger metropolitan areas, and particularly I guess the Northeast and perhaps the West Coast?

From your knowledge of this industry in the last three or four years, has the labor market, that is, the price for labor, equalled or exceeded the minimums under the Fair Labor Standards Act?

"A. For sometime now areas like Philadelphia, Chicago, Seattle, San Francisco, we are paying anywhere from $1.75 to $2.35 an hour.

"Q. And in specific answer to my question, to your knowledge is that in excess of the minimum set by the Fair Labor Standards Act?

"A. Yes.

506 "Q. Now then, sir, I would like for purposes of delineating the specific recommendations that were made down through the years, and according to the exhibits already offered, to point out some particular things in those exhibits and ask whether or not they reflect at present the interpretations and definitions recognized by your Association and in the particular industry.

First, sir, I direct your attention to Page 5 of Exhibit A, which is your letter dated February 21, 1950, and I will ask you to find on that page the statement with reference to the market price of truck tires which are sold in volume, the reference being:

"Since the sales are direct from the tire dealer to the ultimate consumer, the sales have always been considered as 'retail' in the industry and would appear to be truly of that nature."

And again, on the same page of the same exhibit, the phrase:

"As previously stated, such sales are, and are considered in the industry to be, retail sales—but Interpretative Bulletin No. 6 evidently treated such sales as 'wholesale'."

507 Do you find those statements at that place in that exhibit?

"A. Well, first I would like to qualify one thing, that my reply would in no way want to compromise the position of this Association which recognized the authority of

the Federal Government, and we are trying as best we can to re-educate our people to the requirements of the law.

However, I can say that as it is spelled out in this exhibit, that if we were to have a forum or a discussion similar to the one, for example, that we are going to have next week with some thirty tire dealers from various parts of the United States at which time we are going to discuss this matter of identification of accounts, this would be the nomenclature that we would use for purposes of our discussion because they would be the ones which would be most easily recognized and which would leave us on a common ground of understanding.

"Q. Right. Thank you, sir. Now then, with regard to that which has been made Exhibit C to your deposition, and specifically your answer to question number 2, which is a part of Exhibit B, the question being in part:
508 'How does the Association distinguish between sales of parts that are recognized as retail and those that are not so recognized in the industry?'

And your answer to that question number 2 being: 'We classify a retail sale as one made to the consumer. If a tire is purchased for resale it is counted as wholesale.'

And again I ask you, is that a current interpretation or definition as recognized in your Association and in the particular industry?

"A. In our publishing of articles and correspondence we would use this terminology and this we believe would be clearly understood by the tire dealer.

"Q. For further reference and cross-referencing, we will mark the parts of these things in brackets that are quoted for the record.

Now, then, sir, also in the answers by you to questions by the Wage and Hour Administrator, made Exhibit C to

your deposition, on the second page of such answers the statement is:

'As stated previously, all of these sales to com-
509 mercial users, including sales to large fleet users and national accounts, are considered by the Association and the tire industry as a whole as retail sales, for the very practical reason that they are sales to the ultimate consumer.''

And I will ask you again if that continues to be the interpretation and use of such terms and classification of such sales by your Association and the particular industry, today.

"A. This is terminology which is commonly accepted within the industry today.

"Q. Just above that, in the same exhibit, is the phrase: 'As I pointed out in my letter of February 21, 1950, however, in this industry sales cannot be classified as other than retail on the basis of the size of the discounts, because the discount structure is extremely complex and encompasses a myriad of variations. Practically all sales to consumers, even those of one or two tires to an individual user, are made at some kind of a discount.'

510 And I ask you if that is still the attitude and interpretation of this Association and the particular industry, and if the facts stated therein are to the best of your knowledge—whether or not they obtain today.

"A. This is very definitely true even today.

To give you an illustration which may help serve the point, certain trucking accounts have set up dummy companies to receive tires in order to siphon off the maximum of the discounts which are normally allowed for a wholesale delivery of tires, so that they not only get the string of discounts which are given to a trucking account, but get the additional discount of the wholesale sale.

And in our own way of thinking this would be identified

then because he does have, even though it can be quickly seen through, this would be a resale account even though we would surmise that the great bulk of this company's purchases would go to one user.

"Q. Now then, sir, turning to your Exhibit D, which is the memorandum of what is recognized as retail sales in the tire industry, dated July 30, 1954, the lead statement of that memorandum is:

'The purpose of this memorandum is to demon-
511 strate that throughout the history of the tire industry sales to commercial accounts have been recognized in the industry as retail sales.'

And again, with the qualification you very understandably suggested with regard to the obligation of your dealers to comply with the law as enunciated by the Wage and Hour Administrator, apart from that aspect, does this statement still present the views of your Association and the particular industry?

"A. That is true.

"Q. On Page 4 of that same July 30, 1954, memorandum made Exhibit D to your deposition this statement appears:

'We believe that this is the best possible proof that the industry has consistently recognized retail sales as including all sales for use and not for resale. Sales to commercial accounts of course come within this definition.'

And with that same qualification about compliance with the Wage and Hour Administrator's regulations, this continues to be the fact in the industry?

512 "A. This continues to be the fact.

"Q. And finally, at the conclusion of that July 30, 1954 memorandum, this statement appears:

'We submit that all of this evidence taken together makes it clear beyond doubt that sales to commercial users are "recognized as retail sales or services in the particular industry," and should be accepted by the Administrator as conclusive.'

Without reference to what should be accepted by the Administrator, is it still a fact that compilation of the same evidence of the conditions as they pertain today would demonstrate the same recognition of retail sales and services in the tire industry?

"A. Very definitely.

"Q. Now then, Mr. Marsh, you have given us already an insight into the pricing practices in the tire industry, and I believe you may have had some reference to them in some of the information that was marked already from your exhibits, but I would like to direct your attention to a general statement on Page 4 of your Exhibit A, which is your letter of February 21, 1950, to the
513 Administrator, Wage and Hour Division, and I will mark that which is entitled '(2) Price Differentials,' and which continues over actually to the conclusion of the memorandum.

I will ask you to look at that and see if that statement of pricing practices, as they obtained in 1950, would continue to be an apt and accurate general statement of pricing practices among tire dealers today?

"A. I would say that the entire text of page 4 of this exhibit, starting with No. 2, Price Differentials, clear to the end of the page is true.

There has been, within the past thirty or forty-five days a move within the industry to shorten up these discounts and make truck tire pricing more realistic. However, this does not mean that the prolonged discount schedule, which is set forth in these two paragraphs, does not still remain. It does.

Recent market quotations in major cities show truck tires being sold at 9-10's. This off of list. This is 10, 10, 10, and so on, nine times. Now the only way you can tell a dealer in this deal is because he gets another discount for delivering them. So again the status of the

wholesale account against the retail or user account
514 is the differentiations still maintained, but the discounts from list is certainly no gage of the classification of the buyer.

"Q. That was going to be my next question. In the soft market, which you have just remarked about in the tire business in the recent past, even though the number of discounts is extended has there been any pattern evolved that would be different than that stated in your Exhibit A?

"A. I would like to make one point, it isn't 'market', it's 'markets', plural, it's more than one.

"Q. All right, sir.

"A. This is a prevalent situation in the industry that is creating real chaos but no change of the discount schedule basically has been made. In other words, it becomes a series of ten percent discounts. They are trying to make them less numbers of tens, and they have done this by shortening the list price from so-called list down to so-called key dealer, but this accomplishes little in the overall problem area.

I do want to repeat again though that where these sales are delivered by dealers that there is a further discount provided for the dealer for his handling as a wholesale account.

515 "Q. Now then, sir, the aspect of vulcanizing or recapping or retreading comes into some of the documents which have been marked as exhibits in your testimony, and I refer you to Pages 1 through 3 of your Exhibit A, specifically the part headed: '(1) Vulcanizing and Recapping Services by Tire Merchants', and I will ask you if that is still an apt and accurate general statement, and if you would just review it to your satisfaction in order to answer my question.

"A. The material set forth in paragraph 1 of the letter

of February 21, 1950 is still true today, and the three classifications set forth in the first full paragraph of Page 3 are still applicable.

"Q. Now then, sir, I direct your attention particularly to a statement on what has been made Exhibit C to your deposition, and it consists of answers to questions addressed to you by the Department of Labor. Specifically, Question 13, I believe, and that question reads:

"Is the vulcanizing, retreading, or recapping by tire dealers of tires owned by fleet operators, trucking firms, bus and taxi companies, or by other commercial,
516 industrial, governmental or institutional customers considered a whole or a retain transaction?"

And your answer to that Question 13, which appears on Page 4 of the answers made Exhibit C to your deposition is:

'This type of business is considered as retail business in the industry.'

My question is whether or not that statement is still factual and whether that recognition in the industry obtains today.

"A. That is true. And in all the cases with which I am familiar there is a different discount schedule for a commercial sale as against a wholesale sale.

"Q. Now then, sir, further on the subject of recapped tires, and going back to Exhibits B and C, the question raised by the Department of Labor as the 15th question on Exhibit B is:

'Is the sale by tire dealers of tires which they have vulcanized, retreaded, or recapped ever considered a retail transaction? Are establishments operated by such dealers recognized as retail establishments in the industry?'

517 And your answer, being answer No. 15 on Exhibit C:

'Sales by tire dealers of tires vulcanized, retreaded, or recapped by them and resold at retail have always been considered retail transactions, and establishments operated by such dealers have been historically recognized in the industry as retail establishments. In such a case the dealer customarily takes the used tire as a trade-in on a new tire, repairs it, and then resells it at retail. Since the acquisition of the tire is a part of a retail transaction and the sale is also at retail, it would seem clear that the entire transaction should be considered one at the retail level.'

My question with respect to that which I have just read from your exhibits is: Does that continue to be a factual statement and does that continue to be the interpretation of such sales transactions by your Association and in the particular industry?

"A. This is certainly still true today just as it was then. In my opinion it is still considered a retail transaction.

518 "Q. Earlier in your testimony you referred to the fact that sometime ago, you believed as you personally recollect, fairly soon after this exchange of correspondence and furnishing of information to the Department of Labor in early 1951, there was a change or modification of rulings and practices which the Department had prior to that time followed to reflect your Association's and the industry's views with respect to the recapping and retreading of tires.

Am I correct in thinking that the change was to an attitude reflecting what was in the correspondence we just read?

"A. Yes. We were completely satisfied with the outcome.

"Q. Now then, sir, I hand you a copy of publication entitled Interpretative Bulletin, Title 29, Part 779 of the

Code of Federal Regulations, which parenthetically shows on its cover page that it is the text of the Code up to and including January 1, 1960, and any Federal Register amendments issued thereafter, up to and including July 31, 1960. Also on its cover it reflects that it is a publication of the United States Department of Labor, and specifically of Mr. Clarence T. Lundquist, Administrator, whose office appears here as Washington, D. C.

519 And I turn to pages 33 and 34 of that pamphlet or publication, and I can advise parenthetically that this is the form in which this Interpretative Bulletin existed at the time of the investigation of the defendant in the case in which your deposition is being taken.

I will ask you, sir, to review the several parts of this interpretative Bulletin on Page 33 and possibly 34 entitled in part Application of the 13 (a) (2) and 13 (2) (4) Exemptions to the Automotive Tire Trade, and I direct your attention to the several numbered and lettered paragraphs following that title.

My question with regard to same will be whether or not they do or do not conform and comport to the recognition in the tire industry as you know it, and to the use and definition of terms in accordance with the use and definition of the same terms in the tire industry, and first as to Paragraph (b) that has to do with the general application of the exemption under Section 13 (a) (2), and then Paragraph No. 1 underneath that concerning sales for resale.

Is that or not in conformity with the recognition in the particular industry?

"A. (reading) 'Sales for resale: For example, sales

520 of tires, tubes, accessories or services to garages, service stations, repair shops, tire dealers and automobile dealers, to be sold or to be used in reconditioning vehicles for sale are sales for resale.'

This we still consider to be true.

"Q. Now, then, Paragraph (2) under (b) has to do with sales made pursuant to a formal invitation to bid, and it goes on to illustrate what manner and type of sales pursuant to invitations to bid take place, and I wonder whether or not that type of sale is recognized as a retail sale or as a sale for resale in the tire industry.

"A. Frankly, this is a matter in which we have little interest. The independent tire dealer is denied, in most cases, is denied the opportunity to compete for this type of business, so the small amount that is involved here is a matter of little consequence whether you classify it as retail or wholesale.

"Q. All right, sir.

"A. We would assume since here theoretically it goes to the user it would be considered a retail sale, but this is a matter which is generally handled by the tire manufacturer on a direct basis.

521 "Q. Now then, No. (3) refers to sales to national accounts as known in the trade, and it goes on to describe what it means by national accounts.

Now in connection with this, I want you to accept the description of the so-called national account which appears in this Paragraph (3) and state whether or not in the industry such sales are considered to be at retail or are not considered to be at retail.

"A. Well, the language of part (3) is quite familiar to me because if I remember correctly we were helpful in this area. We consider this very definitely to be a retail sale. The only difference between this and any other type of sale to a large user is the manner in which the billing procedure is handled. Instead of being billed by the local dealer, this is billed by the factory or home office on a centralized basis.

The delivery of tires is made on as little as one or two

tires, and they could be passenger tires, they don't necessarily have to be truck tires. So this is a matter of billing procedure and not a matter of classification of account, and as far as we are concerned, this would go in our books, in our accounting breakdown, as a retail sale.

522 "Q. Now, then, turning to No. (4) in this set of regulations which concerns sales to fleet accounts at wholesale prices, and the same paragraph (4) contains an explanation of what the words fleet account means as here used, and the sense and context of paragraph (4) is that that is to be treated as a wholesale sale or at least as a sale that is not retail.

My question is whether or not the treatment of such sales to fleet accounts is interpreted and regularly practiced in the tire industry as a retail sale.

"A. We consider sales to a user, and this we have stated over and over again, as a retail sale. The number of vehicles that the man has is no particular criteria of his classification of account. In many cases the number of vehicles that the man has is information which is denied to the tire dealer; at least he has no accurate way of determining this. This is a classification of account which has no historic relationship to the industry and the classification or establishment of an account.

"Q. Now that same paragraph (4) goes on to delineate a distinction based on the pattern of prices, and refers to the wholesale price of such tires will be taken to be

523 the price typically charged in the area on sales of passenger car tires for resale.

My first question is: Is there a relationship, as you know the pricing practices of the industry, between whatever the price may be on the resale of passenger car tires and wholesale prices for tires, tubes and accessories, or any other factor of the pricing practice?

"A. As we stated at that time, and I certainly could restate again, I believe this indentification of price is unrealistic and unworkable. For example, I am not familiar with the most recent changes because these have not been fully published, we know that they are coming. But to go back to some thirty or forty-five days, one manufacturer has six classifications of buying prices for passenger tires alone.

This is determined regardless of whether the man is a service station, a car agency, a garage or other smaller tire dealer; it is determined by their estimate of his volume. This is not even followed realistically, so to have an audit made of anyone's book and say this is the wholesale price of a tire it would have to be further identified by his saying this is the wholesale price
524 of what tire sold to whom.

One cannot draw a parallel and say that this is a wholesale price that is charged to service stations. Service stations might buy at any one of the six prices and still be considered a wholesale account. The tire business is one which historically has been one of bargaining and you bargain for the best position and the best recovery that you can, and the situation in the tire industry instead of improving since 1958 has deteriorated and the problems in pricing today are even more grave than they ever have been before.

We have a whole new type of super-operator coming into the distribution pattern of tires which even further complicated this situation so that there is nothing on which we can factually, and I will the phrase, hang our hat on, in the identification of an account, except those things which we know, that this is a man who intends to resell the tire or this is the man that intends to use the tire.

"Q. Moving on to paragraph (5) of the same regulation

on Page 33 which has to do with sales of tire rental service on a mileage basis, known in the trade as mileage contracts, and some other material on that subject;
525 first I want to know, is there a position on the part of your Association or its members with regard to this practice if in fact it exists?

"A. Well, the tire rental business is increasing. We believe that anyone who rents tires intends to use tires. They obviously are not going to rent tires for wholesale purposes. They are renting tires because they will be put in service whether it be on a bus, a truck, taxicabs or even pleasure cars today.

This thing has changed. This is a part of the market in which we do not share to a great extent. But as far as a clear-cut marked definition as to who uses rental tires, it is a consumer or user, not a wholesale account.

"Q. No. (6), sales of servicing and repair work performed under a fleet maintenance arrangement on tires for trucks and other automotive vehicles whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price.

Now I understand from your previous elaboration upon the complexities and variation of prices and practices in the tire industry what your argument might be with regard to prevailing retail price. But would you state whether or not this sale of repair work performed
526 under fleet maintenance arrangement would, according to your Association, and in the particular industry, be construed as a retail sale or not?

"A. I think the Industrial Classification Manual clearly identified retreading and those things pertinent to it as a service, and a service in this area, and this is not a large part of the average tire dealers' business. To some dealers this is very important, but the service—and the

retreading of tires is a service, and such would be considered a retail transaction.

One could hardly wholesale service or labor, and the price at which new tires might be delivered in conjunction to this has no relationship to the facts.

"Q. Now to turn over to Page 34 of this same set of regulations, and as the final paragraph of this particular part of the regulations, namely, paragraph (e), the statement appears:

'An establishment engaged in retreading or recapping of tires is recognized as a retail establishment in the industry if it does not derive from the sale of tires retreaded and recapped for sale more than 50 percent of the annual dollar volume of its sales resulting
527 from its retreading and recapping operations.'

Now I want to know if there is, to your knowledge, a recognition in the particular industry or by your Association of this 50 percent break-off point with regard to dollar volume of sales in the determination of whether or not a tire retreader is a retail establishment.

"A. This particular paragraph is confusing to us because earlier in the same regulations it refers to 85 percent in the category breakdown. I know of no industry definition of 50 percent, and the only way I know of that this may have been arrived at, I just learned in the past six months that the Bureau of the Census in judging whether a man is principally tires or principally hardware or principally retreader is determined by whether better than 50 percent of his business is done in one category or not.

This is the only part of the industry that makes reference to 50 percent. We didn't even learn this until we had some conferences with the Census Bureau people within the last six months.

"Q. But you would not agree then with the statement as it appears in this regulation?

"A. There is no clear-cut definition of this in the industry.

528 "Q. Now then, sir, you have indicated the date 1958, and I would like for purposes of the record to determine whether or not, according to your present recollection, it was during 1958 that you engaged in these conferences with personnel at the Wage and Hour Division, among them Mr. Goldberg who has joined us this morning, apropos the publishing of regulations in the original form from which I have just made reference and extracted in my last few questions.

"A. Yes, we had a series of conferences on this.

"Q. Now during the last little while in your testimony you have stated certain of the handicaps or hardships, disadvantages to the classifications as expressed in those regulations.

Can you recall, sir, whether or not the same type disadvantages and type of hardships were expressed to appropriate officers at the Wage and Hour division during your conferences in 1958?

"A. I have every reason to believe that basically the same arguments, the same illustrations that I have used this morning in relationship to this problem were true then and presented then. We had strong reservations at that time about this, as I pointed out earlier. There were some compromises made in some of them, particu-

529 larly the number of vehicles, and so on, but even with that we pointed out that we felt this was very unrealistic, very hard to determine.

At that time it was pointed out to us that our only alternative might be to select someone on whom we could make a test case out of. Well, this is a very reluctant position for a Trade Association to place itself in, to select one of its membership for a matter of this kind. That is one of the things we feel it is appropriate for a

Trade Association to avoid, to keep itself clear of legal involvements, because we are not in a position of giving legal advice in that sort of thing.

Our job is to help our members and not to deal with their law problems. So we backed away from this particular choice and did the best we could with the proposal that was made and said that we would do everything we possibly could to assist its facilitation, which we have done, I might add.

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531 **Cross-Examination,**

By Mr. Ray:

"Q. Mr. Marsh, among your many duties and responsibilities as Executive Secretary and Manager of the Association you occasionally, I believe, testify before Congressional committees?

"A. That's right.

"Q. Particularly in reference to items concerning the membership of your Association?

"A. That is true.

"Q. In connection with that you testified in the hearings in June, 1959, before the Sub-Committee of the Select Committee on Small Business of the United States
532 Senate of which Senator Morse was Chairman. Do you recall that testimony?

"A. Correctly stated, sir, it was a Sub-Committee of the Select Committee of which Senator Humphrey was the Chairman of the Sub-Committee and which he chairmanned on several occasions, and on which, as I recall, Senator Morse was Chairman or moderator for the day.

"Q. Apparently from the record he was the Chairman of the particular date on which you testified, which was June 17, 1959.

"A. I think that is right.

"Q. One of the items about which you were testifying there, or perhaps the principal item, was as a result of the unfair competition in your opinion which independent tire dealers were facing from the practice of the large tire companies to make direct sales sometimes even to customers who bought as many as two to four tires; is that right?

"A. That's true.

"Q. In connection with that testimony you described to the Committee how you and your Association had worked with various Governmental agencies in connection with the regulatory laws which might be applicable
533 both to tire dealers and business generally as far as anti-trust or competition is concerned.

And you indicated to the Committee that you had, in connection with working with the Department of Labor and an explanation of the Wage-Hour law as it applies to tire dealers, that you had published a manual on this subject for your industry. Do you recall that testimony?

"A. On the Wage-Hour laws?

"Q. Yes.

"A. Yes.

"Q. Now I hand you here a pamphlet or document which you have made available to us and ask you if this is the document you were referring to in your testimony, and if that was issued by your Association to your membership; and if so, whether as far as you know, it went to the thirty-some-odd-hundred members of your Association.

"A. Yes, this book without the insertion, which is a publication of the past six months. This book itself, without that insertion, was the matter to which I referred.

"Q. Does that particular manual still have validity as far as your Association is concerned in the sense that it has not been in any way revoked or otherwise amended by your Association?

534 "A. With the exception of the amendments to the Fair Labor Standards Act, which were recently invoked by Congress, which have been added as an amendment to the thing, and we still circularize this to any member who requests it, and we sent it to new members.

"Q. Would you file that document as Exhibit 1 to your cross-examination in this deposition?

"A. The insert to which I referred we will have stapled to the inside cover so it can be made a part of the permanent book record.

(Whereupon, booklet was marked Government Exhibit No. 1, for identification.)

By Mr. Ray:

"Q. Further, in connection with your testimony before the Senate Sub-Committee, you included a chart which reflected the various percentages of establishments that did various gross amounts of annual sales. That particular chart I show you on Page 22 of the official record of the hearings and ask you if that particular chart is still valid, generally speaking.

"A. This was predicated on the 1954 U. S. Census of Business. There are some changes in category here
535 which are probably the result of changes in the marketing pattern of tires. To what extent this would change the percentages or the number of establishments is very difficult for us to determine inasmuch as we don't have access to all of the industry figures. As far as the number of establishments are concerned, this is still a pretty valid figure.

"Q. This particular chart would reflect that establishments that did $30,000 to $49,000 in total sales comprise 16.2 percent, and I am reading now the larger ones, I am leaving the smaller ones out.

$30,000 to $49,000, 16.2 percent;

$50,000 to $99,000, 22.4 percent;

$100,000 to $299,000, 23.8 percent;
$300,000 to $499,000, 4.3 percent;
$500,000 to $999,000, 1.7 percent;
$1 million to $1,999,000, .2 percent;
$2 million to $4,999,000, .03 percent.

Now, with particular reference to the last three items in that chart, could you state whether or not in your best judgment those figures would roughly hold their validity today, give or take a fraction of a percentage point, so as to make it easier for you to answer?

536 "A. This is the group from $500,000 a year up, that is, $500,000 to $999,000; $1 million to $1,999,000; and $2 million to $4,999,000; those three groups?

"Q. Yes.

"A. I would say as a guesstimate this is probably reasonably accurate yet today.

"Q. Now, with respect to the retreading of tires as performed in certain tire dealer establishments, let me ask you if it is or is not a customary practice for the tire dealer to sell retreaded tires and take in trade for recapping and sale to other customers the tires of their customers as trade-ins?

"A. This would be a very hard thing to determine and it would vary a great deal by establishments, but from traveling a great deal over the country and visiting a great number of tire dealerships, I would be more inclined to feel that the common practices are to retread the customer's own tire and return it to him.

Many places feature one-day service and will take the tires, make an appointment, take the tires in the morning and have them retreaded and back on the car in the afternoon. It is true that there are cases, in the case
537 again of passenger tires, that the tire is taken off and they find out of four, one of them would be no

good so that they might have a matched up set they won't sell him a tire out of stock.

There are some places, on the other hand, that would prefer the practice of exchanging casings, but whether this is a large number or not I have no way of knowing. I would not think it would be.

Now the truck tire field is completely different. The truck tire field is principally and almost wholly the retreading of a customer's own tires and returning them to him.

"Q. In connection with your correspondence and conferences with the officials in the Wage and Hour and Public Contracts Divisions of the United States Department of Labor about which you were examined earlier in your direct examination, have you had other correspondence which has been called to your attention, and if so, what did that further correspondence consist of and what was the date of it?

"A. I have here a letter dated July 3, 1958, addressed to the Honorable Clarence T. Lundquist, a letter over my signature, covering what seems to be two particular
538 points in the proposed regulations or interpretations for the tire industry, adding some views which we hoped would be helpful.

Then we have a letter over the signature of the Administrator. Unfortunately, this is a carbon copy, unsigned, and I am provoked with the fact that we cannot find the original, which is an acknowledgement by the Administrator, addressed to me, a probable date of which is November 4, 1958, which acknowledges receipt of this correspondence dealing with national account sales on the one hand, and the customer's fleet size on the other.

"Q. Will you identify those documents, the letter from you to the Administrator of July 3, 1958, as Exhibit No. 2 to your cross-examination?

"A. Yes.

"Q. And the reply, of the approximate date of sometime in November of 1958 as Exhibit No. 3 to your cross-examination?

"A. Very well.

(Whereupon, copy of witnesses letter of July 3, 1958 to Administrator was marked Government Exhibit No. 2, for identification.

Copy from Administrator to witness was marked
539 Government Exhibit No. 3, for identification.)

By Mr. Ray:

"Q. Mr. Marsh, as the record already indicates, there were extensive conferences and communications between you and the Labor Department subsequent to the 1949 amendments on up until this 1958 date concerning the interpretation the Labor Department would issue concerning those sales which were regarded as retail in the industry?

"A. That and the matter of the retreading being classified as a service. We had a great number of conferences on both matters.

"Q. And you furnished extensive information to the Labor Department officials on this point and supplied them with all the information that you could think of, I would assume, or at least I should ask you if you did, so that they would fully have the views of your Association concerning what would be the proper construction of these questions as they affect independent tire dealers, did you not?

"A. This is true, and in July of 1954, for example, we did a rather comprehensive survey of our members on these various points to develop some information
540 which would help to determine these problems which were being propounded.

"Q. Then to your knowledge the Labor Department

officials at least gave time consuming and lengthy consideration to the problem?

"A. I have every reason to believe that they did. At least they were given the opportunity to give it every consideration.

"Q. And they, in working with you as a representative of the Association, strove to arrive at some common ground as to what interpretation would be both practical and at the same time be either the construction of the law, at least which the Labor Department considered to be the interpretation of the law which would cause the least displacement in the industry and at the same time give due regard to the law, did they not or did you both not?

"A. If counsel will permit, I would like to make this observation: We were quite content with the phrase, 'as recognized in industry', and we were content to leave the law at that point. The Labor Department was not. Inasmuch as they were not content to leave it on that point, then we tried to contribute as much as we could to make such assistance available as would have an inter-

541 pretation which would be the least problematical.

In other words, what I am trying to say here, at this point here I think any unanimity of thought in this area had gone. It was a matter of compromise more than anything else.

"Q. Mr. Marsh, if I may I would like to read to you and ask you to state whether it accurately represents a picture, and I will show it to you so you can read the whole thing, and counsel if you wish, a statement in an inter-office memorandum to the Administrator, from Mr. Kantor who was concerned with this problem which referred to conferences that you had with the officials of the Labor Department, and I am now reading from this memorandum.

Mr. Mitchell: Pardon me. I don't think the record reflects—you used the term inter-office memorandum, would you state with whom Kantor was associated or by whom he was employed so he will know?

By Mr. Ray:

"Q. Mr. Kantor was one of the officials in the Wage and Hour and Public Contracts Division of the Department of Labor, and Mr. Brown, to whom this memorandum was addressed which appears to have been
542 received, which appears to have been prepared on March 22, 1958, and which reads in part as follows, the pertinent part:

'Sales to "national accounts" were conceded to be non-retail by the representatives of the National Tire Dealers and Recappers Association in our conferences with them. However, Mr. Marsh, the Executive Secretary of that group, urged incorporation of a definition of such accounts as "customers operating in more than three states who have centralized billing". The difficulties this would provoke were pointed out and he did not pursue the matter further.'

I will show you that memorandum and ask you if that is correct summary of the conferences you had on that particular subject with the officials of the Labor Department?

"A. The problem set forth in this memorandum which is dated December 21 that sales to national accounts were conceded to be non-retail is an extremely controversial point which could take up the next two hours of deliberation if we followed it because this became a very tender point, that if a sale is not retail and it is not wholesale, what is it. And what a category of non-retail
543 involves, to this day I do not know. But this was nomenclature which said this was neither one nor is it the other, so for the purposes of interpretation it becomes non-retail.

This is the same category in which most truck tires fell because the description of the word non-retail was that delivery of tires 50 at a time, 20 at a time, was hardly considered a retail sale. So therefore, being not a retail sale or if we cannot accept it as a retail sale, it became non-retail even though it wasn't wholesale.

As a matter of fact, in these very deliberations it was pointed out that the delivery—a new car changeover of a brand new automobile of five tires was one more than a customer would normally buy since he has only four wheels on the ground. Therefore, changeover from black to white sidewalls on a brand new 1960 or 1961 automobile, whatever the case would be, is a non-retail sale because it is in quantities more than those normally used by a motorist.

This I do not understand. I did not understand it then; I don't understand it now. And it would be erroneous to say that I accepted it. I merely gave way because I could see no point in arguing something that is a completely foreign term of which I am not in the least bit familiar.

544 The same evidence is pointed out here in the fact if we are to have an interpretation of national accounts, which I pointed out in earlier testimony is not a matter of grave concern to us, then we have terminology for national accounts in this industry. There is a law case on record which spells out and identifies national accounts.

"Q. Is that the Federal Trade Commission case?

"A. No, sir. This is a court where we sought damages, and it is spelled out in this law. It has also been spelled out in testimony before the Federal Trade Commission. There is a clearly identifiable definition of national accounts.

It definitely constitutes deliveries in more than one state. It definitely constitutes centralized billing, and all

other opinions notwithstanding, this is still what we know in the industry. So to be arbitrary and say this is not workable, this cannot be, as it was accepted as stated in this (indicating), is, as far as the tire industry is concerned, unrealistic.

If we have to live with it we will try to find some way to live with it. This was our position at the time; I guess it's our position now. As far as this being any matter of acceptance on our part, I protested vigorously at the time, and I protest vigorously now, because
545 this is not realistic.

"Q. You were not persuaded then, as I understand it, by the arguments advanced at your conferences that the national accounts, as they are described in the—ultimately described in the interpretation which was formulated on the basis in part of some of the language suggested by you, that they are non-retail or should be regarded as non-retail sales; am I correct on that?

"A. Let me first state that I think that the definition which finally came out and which is set forth in our little brochure, booklet, is a reasonably accurate definition of a national account.

But I frankly still do not know what a non-retail account is, if it isn't wholesale.

"Q. While we are on that subject let me ask you whether or not, according to accounting practice in the tire industry, there is in fact not three recognized categories of sales without regard to whether they are retail or non-retail and wholesale and so on, and that is, retail, wholesale, and commercial?

"A. Basically this is true.

"Q. There is, in fact, a third category of sales which are recognized under accounting principles?

546 "A. With very good reason there is a third category.

"Q. Would you mind giving us the benefit of your

views as to what the reasoning is behind having the third category of commercial accounts?

"A. Generally the establishment that will break this into three categories is a larger establishment with salesmen, with outside salesmen. A retail salesman, as such, does not sell truck tires. A truck tire salesman might sell passenger tires but does not solicit passenger tire sales.

A truck tire salesman in a commercial department, per se, works on a narrower margin of commisison and very often the deal made to a salesman working for a retail establishment selling commercially will have a different deal or percentage paid on gross profit to the commercial salesman than they will to the retail salesman.

As a matter of fact, the retail salesman is even broken down into times to the budget for the retail or passenger tire salesman. The series of discounts on commercial tires and truck tires is different from the deals made on new passenger tires.

A wholesale account, to separate it out, is done for the simple reason that we often find it one part of our business activity that becomes unprofitable. So it is not
547 unlikely that a large tire establishment would have a tire division selling at retail, a tire division selling commercially, and a tire division selling at wholesale, so they could operate all three.

Good accounting procedure dictates if you like to know what each department is doing and how it is working its way out, that you are wise to separate it this way. The unfortunate part about our industry, which has no bearing on this case, is that more people don't do it.

"Q. Now let us come back to the issuance of the regulation and its publication in the Federal Register as a preliminary determination upon which the comments of industry are solicited.

Do you recall your suggestion to the Wage and Hour

officials that the time had now come that they might as well proceed with that aspect of the rule-making to see what comments would be received after they had conferred with you concerning the language that should be included; do you recall your suggestion to those officials that apparently we, by that I mean you and the officials had come to the point where now was the time to put that out as a preliminary determination for comments; do you recall that?

"A. We certainly arrived at a point where further discussions were going to contribute nothing. We had
548 exhausted the whole thing and if we were to have some sort of interpretative rule, this was as close as we would get to it that would be completely satisfactory, although we preferred no rule, we apparently were going to get a rule whether we wanted it or not, so at that point there was nothing left to do but to see what would happen. So we were told that unless there was a strong objection that this would be published in the Federal Register, which it subsequently was.

"Q. And then thereafter, after the period for comments had expired, if your recollection permits you to say so, the so-called final regulation was published as such in the Federal Register, a copy of which I now hand you. I don't intend to put this in since it was published.

I don't recall the date, but it was scheduled to be published, according to this, in the Federal Register on February 25, 1959.

"A. And it became effective March 28, 1959. Without reading every word, this appears to be the document as I know it.

"Q. And that having become the official interpretation of the Labor Department you then circularized your members as to what that official interpretation was
549 as is shown by the manual here which is Exhibit No. 1 to your cross-examination?

"A. This is true.

"Q. It does not appear to me what the original publication to this was, but according to your recollection in your testimony it was issued after the effective date of the official interpretation as published in the Federal Register?

"A. I think it would be fairly safe to say that this would be true.

"Q. Mr. Marsh, in your testimony you referred on occasion to the setting up of a dummy corporation so corporations can get the maximum discount, I think those are your words, and referred to wholesale delivery of tires.

Could you elaborate on that and clarify that a little for us as to what you were referring to?

"A. With discounts such as 7-10's, 8-10's, 9-10's, there obviously isn't or should not be very much left with which to pay for the cost of the merchandise. However, where dealers have made deliveries of this kind they have oftentimes, in most cases, been guaranteed a commission as we have pointed out in the direct selling hearings, to which you referred earlier.

550 So some larger truckers, in order to get the full deal, have bought a small service station or taken it over or put in a store front operation, called it a tire store, and became their own best customer, and this way they got not only the long discount deal given to the truckers, but their wholesale allowance as well. So they get all the privileges of a wholesaler, and all the privileges of a commercial or consuming account, and enjoy both.

"Q. Well, there is recognition or at least it is not foreign to the tire industry that quantity purchases of tires by a customer as well as quantity purchases of tires by a dealer carry a lower price than purchases in smaller quantities is that not correct?

"A. This is true. On one hand clear down to the point of buying two passenger tires for your own personal

automobile will get you a better price than one tire, and if you buy in sets it will get you a better price than if you buy two.

The only problem with the tire industry is that you are not sure that when you buy a set you are going to get as low a price as the man who bought two. If this were to fall into some sort of a measurable pattern this would be one thing, but there is no apparent pattern in the tire business.

551 I have seen tire prices change in one day like the ticker-tape on Wall Street. It is unbelievable, some of the things that have gone on when we have price wars in an area, their prices change momentarily. And in this case quantities are forgotten.

So there is recognition given for quantity clear down to the purchase of two passenger tires.

"Q. Is there anything basically different in a tire war as you seem to have described here and a gasoline war?

"A. Well, frankly I cannot answer that question. I get so deeply involved with the problems of the tire business I seldom have time to look at other industries. I assume they have problems too. But one thing I do know: Time after time and time again the tire industry has gotten some pretty bad publicity for some of the pricing practices, and the files of the Justice Department and the Federal Trade Commission are pretty tangible evidence of this.

"Q. But you are not testifying, are you, that quantity purchases either by the dealer or by the dealer's customer would not ordinarily call for a lower price than the purchase of four of the ordinary two to four times?

"A. Basically this is true. As a matter of fact, even their wholesale pricing program has certain consid-

552 erations for volume purchases whether they are in one delivery at one time in one place or whether

they are extended purchases over a quarter or over a twelve-month period of time.

There are considerations given to volume in the whole industry program. I should not be so sweeping in that remark because I believe there are some smaller tire manufacturers that make an exception to that, but basically this is true.

"Q. Is it or is it not customary for the dealer on sales made pursuant to national accounts to install the tires and otherwise perform services for which he receives a commission of some amount which varies anywhere from five percent perhaps to ten percent, or somewhere in that neighborhood?

"A. This is true. Seven-and-a-half percent is about the accepted thing. Some companies go ten. I think there are some deals that are handled on five. And in return for this, why the dealer mounts the tires.

"Q. He has to stock them too?

"A. He has to stock them, put them on the car, and then fill out a form and send it in and sometime in the future, why he gets a credit back for what he put on plus the handling charge.

553 "Q. On the sales to Government, State, local municipalities, sales of that type, is the procedure similar to that followed on national accounts, or, if not, what differentiation would you make between sales of that type and national accounts?

"A. Well, if there is anything I have learned in the past couple of years, the question you have just asked eliminates me as any sort of authority, because I found so many procedures in this thing I am just not sure how to describe it.

As I understand it, and I will have to repeat, as I understand it, there are a number of states which require local dealer participation on state sale, so that a company

can get the bid but the dealer in that area must be able to participate in the business and they can select whatever dealer they want.

The Federal Government sales are made direct to the Federal Government by the manufacturer, and I know of no dealer who participates in this unless it might be on some sale to a GSA account or possibly to some small station that might have some funds made available to them that they can purchase locally, and this generally is predicated on a GSA contract with that company.

554 Municipality business is sometimes taken by an arrangement similar to national account with billing and credit-back, but again your pricing procedures here are just as bewildering in this field as they are in the entire tire industry as evidenced by one of the dockets now before the Federal Trade Commission which finds the states are buying tires cheaper than the United States Government, which is a very bewildering thing to the United States Government.

"Q. What differentiation, Mr. Marsh, do you make between fleet sales as they are described in the interpretation, which also is formulated on the basis of suggestions made by you, and the national account sales, as to the participation by the dealer in the ordinary case or by the dealer as distinguished from his non-participation and the direct sale by the manufacturer?

"A. Now as I understand it, in answering this question I am confined to my remarks about the fleet sales being limited to the interpretation as it is here, and not to fleet sales in the category as we understand fleets. You are talking about, in the strict sense of the regulation, the number of vehicles?

"Q. It would be preferable if you could deal with it

555 generally and then draw it down to the definition.

"A. All right. I can dismiss that part easier.

It is very difficult for the tire dealer to ascertain how many vehicles are owned by any fleet account. For all I know the head of the business might have his wife's automobile listed as part of the fleet. It is true, as I have pointed out in correspondence and with conferences with the Department of Labor that we do break down—the manufacturers I should say—break down ten or more trucks, it matters not how many vehicles, ten or more trucks, as a source of solicitation and try to encourage the dealers to call on these people. Some do it with five; others don't. Then there are some, the larger accounts list twenty-five and more.

On a national account sale the dealer can solicit the business but he knows that he can only get an order if he is on the approved list and if he happens to sell a brand of tires which is not on their approved list, visitation will get him nowhere because he is disallowed, he just isn't in the business. He can't get this.

But if his company is on the approved list he can go in and say Do you need some tires, and they say, Yes, we'll buy six next month, or whatever the case may be.
556 They generally order in that fashion, and he can go ahead and make sure he has the stock and make delivery at the proper time for which, as we pointed out, he gets a specified commission.

Now right next door may be an account that buys more or less as the case may be, which would be a fleet account. He could have five trucks and buy $15,000 worth of tires a year and the fellow on the other side of him may have fifty trucks and buy no more. It would depend on whether one runs trucks on a coffee route or whether it has over-the-road trucks.

If he makes a sale to this fleet account, in the broad sense of the word, no matter how many vehicles are involved, he determines the prices he will sell it at, and

he determines whether there is sufficient profit for him to render the service, make the delivery, carry the credit, and do the other things he must do.

Now as we showed again on our testimony on direct selling before the Senate Small Business Committee, we have a third variation of this now where the manufacturer comes in and even the smallest dealer buying
557 $25,000 worth of tires a year can take an order for 25,000 truck tires and make the delivery because his manufacturer will assist him in making the delivery and give him some sort of a token payment for it.

As a matter of fact, the manufacturer in some cases, in very many cases, will even send the truck in and have service people mount the tires for the fellow. Of course, his commission becomes lesser as he gets to these things.

In either case there are tires sold to a user or consumer. They are a fleet sale or commercial sale, whatever nomenclature you wish to give them, and they all add up to the same thing. The difference is the way you arrive at this particular conclusion or sale.

"Q. Now one, I think, final question. You have broadly characterized all sales made to a consumer or user as a retail sale irrespective of the quantity of tires involved in the transaction or the price charged for the tires in that particular transaction, including all the various discounts, and so on.

In other words, is this a fair statement: That if I purchased a thousand tires for my equipment from one of your members at a price which was thirty percent or more below what Mr. Mitchell would pay if he went in
558 and bought four tires from that dealer on that same day, that both those transactions, his purchase and mine, would under your view as expressed in your testimony here, be regarded as retail sales?

"A. Let me see if I have the question correct. You

are talking about making a sizeable purchase for a thousand units, thousand tires, to fit your equipment?

"Q. Right.

"A. Mr. Mitchell is a what, a dealer?

"Q. Mr. Mitchell is another customer who goes to the same dealer on the same day and buys four tires for his car and he has to pay at least thirty percent more for those tires than I have to pay for mine.

"A. Then they are both retail sales.

"Q. Your view would class both transactions as retail?

"A. And if they were in the State of Ohio we would have to pay sales tax on both sales.

"Q. Would it make any difference if both Mr. Mitchell and I were buying specialized tires like snow tires, which we intended to store and put on when it became winter time?

In other words, does it make any difference in your evaluation of the thing as to whether they are going to be used right away or maybe they are going to be
559 held and used later? I believe you said in your testimony that the intended use was the criteria.

"A. If it is your intention to use these tires and you are the consumer, therefore, this is a retail sale. And the fact that you might, for example, start buying up let's say earth moving tires for big equipment on a big contracting job which you are going to store and stock and transport, and it will be six or eight months before you get all set up on the job to operate, this is still a retail sale.

And I made mention a while ago of an account buying $25,000 worth of tires who gets a sale for 25,000 tires. This doubles his business. But the 25,000 he buys to resell in his place and the $25,000 in one order that he delivered, or four lots, I don't care how he delivered them, is a retail transaction.

Mr. Ray: You may have the witness if you wish to re-examine.

**Redirect Examination,**

By Mr. Mitchell:

"Q. Just a few questions, I believe, Mr. Marsh, with respect to some of the items or exhibits introduced in your cross-examination.

First, I believe during the break just prior to
560 your cross-examination you located a blue printed sheet entitled Basic Wage-Hour Law, and organized generally in three columns.

I will ask you if you would sir, to please describe what this is and state whether or not it came out prior to the 1949 amendments to the Fair Labor Standards Act, and what use was made of it.

"A. No, this blue form here is the second of two almost similar forms. We brought this out to help our dealers to understand the law and to properly classify their employees and to understand some of the things about the law which would be a problem to them, particularly a matter of record keeping. Then when there was some changes made, particularly those dealing with re-treading, then we brought this second form out and this was given very wide distribution. It was given out at a number of our meetings and we did everything we could to help familiarize our people with the requirements of the Fair Labor Standards Act.

"Q. Could you tell me approximately what the dates of those two publications were as issued by your Trade Association, and I don't need anything more specific than before or after 1949, which from your testimony this morning would be during the time you have been
561 the Executive Director.

"A. This has been since 1949.

"Q. Then I am correct in thinking that that presents your Association's interpretation and analysis of the Wage-Hour law as it existed after the 1949 amendments?

"A. Even more correctly than that, that form as was the booklet which was introduced as evidence, were both read, and while I understand technically the Department of Labor cannot give approval of documents of that kind, I think I can safely state that they found no exception to the things that were stated there.

"Q. I would like for you to mark those exhibits, please, sir, to your deposition. And since this is redirect, let's return to the lettering system. If you would mark the first of the two in the order in which they appear.

"A. These are both the same. I don't have the old white form.

"Q. Then would you mark this Exhibit G to your examination?

"A. Yes, sir.

(Whereupon, paper entitled Basic Wage-Hour Law was marked Defendant's Exhibit G, for identification.)

562 By Mr. Mitchell:

"Q. Now then, Mr. Marsh, if we cannot determine specifically the year in which this blue form now made Exhibit G was circulated by your Association to its members, do you recollect that this blue form was published and circulated by your Association before the proposed regulations by the Wage and Hour Division came out we think in 1958 or 1959?

"A. Oh, yes, it was very definitely before that. As a matter of fact, the amount of wages shown on here, the minimum, shows it was previous to the inauguration to the one-dollar an hour minimum wage.

"Q. In respect to the brochure or pamphlet that has been made Exhibit 1 to your cross-examination, Mr. Marsh, you are, I am sure, familiar with the substance of it?

"A. Yes.

"Q. And I want to ask you whether or not from your knowledge and recollection it states anywhere in the pamphlet itself that the pamphlet presents the recommendation or the approval or the accommodation of your Association to the regulations that are discussed in it.

"A. As far as I know there is no reference made to that. It was never intended to do that. It is not supposed to be a propaganda piece. It is a documentary bit of
563 assistance to dealers to help them to understand the law and that is why the illustrations and so on are put in there.

"Q. Do you recollect whether or not a letter or correspondence of any sort went out with it to your members expressing your Association's satisfaction with the regulations as they had finally appeared, or dissatisfaction with such regulations?

"A. I am reasonably positive that there was nothing put in writing for the simple reason that we worked on the premise the least said the better.

"Q. Now then, on your cross-examination, sir, you were asked about a table that categorizes tire dealers apparently by sales volume and which is referred to in the questions on cross-examination as appearing on Page 22 of the official report of the Committee in June of 1959, before which you testified.

I would like to show you the table to which reference was made in such questions and ask you if you can tell by it or your knowledge of it or the footnote that appears beneath it, whether or not this analysis of dealers by income reflects all tire dealers or reflects only your Association members or just what does it encompass?
564 "A. In the first place, the connotation of the word 'dealers' in the sense of independent tire dealers is incorrect. Sales volume of TBA dealers refers to the

outlets and it also includes the company-owned stores of the major rubber companies.

The analysis made by the 1954 Census of Business as I understand it, and as it has been described to me by the Census of Business, means in these cases there are approximately 18,000 people, fifty-one percent of whose sales are in tires, tubes, retreading and related lines in the rubber field. It is fifty-one percent or more.

They also show quite a number, some 2,000 retread shops who sell new tires, but fifty-one percent of their sales are in retreading.

It could very well be as I pointed out earlier, a man could have a tremendous appliance business doing half a million dollars, or be a big oil jobber, and not be included in this listing.

"Q. And to further elaborate the figures and the gross volume and the percentage of retailers or outlets doing such volume as reflected by this chart, will you state, sir, whether or not that would or would not be consistent with the same figures as applied to your Association's
565 membership, if you know? That is, if such figures have been compiled.

"A. I have never even considered it in that light. I couldn't answer that intelligently. If I were going to hazard any kind of a guess, ours would be well towards the middle.

I can tell you the size of the membership of our Association and what our dealers sell, but this I don't know would be of any assistance.

"Q. I believe you stated on cross-examination that this chart in any event would include company-owned stores or controlled outlets as well as the so-called independent retailer who would be a member of the Association?

"A. It could also include automotive chains.

"Q. Yes.

*Testimony of Winston W. Marsh*

I believe you brought some more information down pursuant to request by Plaintiff's attorney that you accumulate what you could from the files during this period, 1954 and up into 1958.

Would you state, sir, what this is, that is a typewritten memorandum apparently dated July 20, 1954, addressed to the members of the Executive Committee, to which are attached several folded accounting column
565a sheets? I would like that identified and described please, sir.

"A. I don't know what provoked this, but apparently it emanated from some conference held with the Department of Labor officials, but it seems to be an answer to some sort of request for further information about how sales are ticketed or how they are broken down.

This has been a long and controversial subject, as has already been indicated today, and I am sure that there must be more of this than that. But one of the people, and this is from Demers Brothers, Inc., 333 Pleasant Street, Worcester, Massachusetts, and he gives us a copy of his tire department sales and types this statement in:

'For the past twenty years we have separated our tire sales into wholesale and retail sales. We have always classified our sales to commercial accounts as retail sales.'

Down below he writes an addenda to this, dated July 23, 1954:

'I have just checked the local Goodyear store and found that they are also treating their sales to commercial accounts as retail sales.'

Here is another one. This one is from Bill Deane, which is a tire company in Roswell, New Mexico. This is
566 a notarized statement and says:

'This is a copy of the daily sales journal and form used and has been used in the past six years in the operation of the Bill Deane Company.'

And it shows tires, retail, wholesale, batteries, stock, and so forth, accessories, retail, wholesale, and recaps, retail, wholesale. They also sell sporting goods, retail, wholesale; major appliances, retail, merchandise, appliances, retail, television, retail.

As I recall it there were other answers to the same thing. I don't have those in the file. These are the only ones I could find. There was apparently a problem of time because the memorandum is dated July 20, 1954, and I said I had to have an answer by July 27, so this must have been one of those matters of hurry up.

"Q. Mr. Marsh, I will ask you to refer to Part III of your Exhibit D earlier identified in your testimony, starting on Page 4 of that exhibit, the date of which exhibit is July 30, 1954, and I wonder if perhaps by reference to that part of Exhibit D your memory may be refreshed somewhat in that sort of an analysis was being made, and among what part of your membership.

567 "A. This exhibit shows:

'In obtaining information on this score,' the accounting procedure, 'it has of course been necessary to use a sampling procedure. The Association could not seek information from each of its approximately 2500 members. Nor could it use its Board of Directors for this purpose, since it has 56 members. Hence we decided to use the Executive Committee, which has 12 members located throughout the United States as follows: Montgomery, Alabama; Phoenix, Arizona; Oakland, California; Atlanta, Georgia; Chicago, Illinois; Worcester, Massachusetts; Henderson, North Carolina; Tulsa, Oklahoma; Portland, Oregon; Ardmore, Pennsylvania; Dallas, Texas; Aberdeen, Washington.

'At a meeting of this Committee held July 19-20, we asked each member to state his accounting practices with regard to classification of sales. Eleven of the members

of the Committee reported that their accounting records classify all sales to consumers, whether they be commercial users or individual users. In the wholesale
568 category, they include all sales for resale. These 11 members also stated that this practice has been uniformly followed by them for many years past.

'The twelfth member stated that his accounting records broke sales down into three categories—retail, commercial, and wholesale. He added, however, that this were merely a matter of convenience to him, and that he had always considered sales to commercial accounts as retail sales, since they are sales to consumers.'

"Q. Now then, sir, having read and refreshed your memory from Exhibit D, could you determine whether or not this July 20, 1954 statement addressed to the members of the Executive Committee, and the attached accounting data were sought and obtained pursuant to or in connection with the survey discussed in Exhibit B?

"A. My recollection is that the form from Demers Brothers is in answer to it and that the form supplied by Bill Deane from Roswell, New Mexico, is in addition to this.

"Q. Well, would you then mark the memorandum
569 and the one of those that you think is a part of it——

"A. This is the man from Worcester, Massachusetts. I think it so states.

"Q. All right. Would you make that then Exhibit D-1 and Exhibit D-2 respectively, to your deposition?

"A. Yes.

(Whereupon, copy of memorandum of July 20, 1954 and attached journal were marked Defendant's Exhibits D-1 and D-2, respectively, for identification.)

By Mr. Mitchell:

"Q. Mr. Marsh, on your cross-examination you were

offered and read certain excerpts from this memorandum by a Mr. Kantor to Mr. Brown, the explanation having been given that both of those gentlemen were officials of the Wage and Hour Division of the Department of Labor during the time this memorandum was exchanged as an inter-office memo. And you were asked if it correctly reflected the sense of agreement or disagreement at the conferences between yourself and others on behalf of the industry, and presumably Mr. Kantor and others on behalf of the Department of Labor.

570 I would like to ask you with reference to the same memorandum by Mr. Kantor whether or not the statement made here, and I quote:

'. . . the traditional patterns of distribution are not followed in the tire trade.'

Is that, in your opinion, an accurate statement? You can probably read it easier than you can listen to it.

"A. (reading) 'As in the case of the automotive trade . . .'

Frankly, I am not sure what is meant here by the words automotive trade. Whether this means automotive parts, whether it means new automobile distribution, or whether it means allied lines like oil and petroleum.

"Q. Was this something that was discussed or agreed upon or decided in any way during the conferences between yourself and Mr. Kantor, and presumably others?

"A. Well, I don't recall this having been discussed, and I certainly could not qualify as any sort of an expert to render an opinion on the automotive trade. But from what little I know of the automotive parts trade, and what I have seen in the oil trade, there is not a great deal of difference than the tire business.

571 "Q. Further in same paragraph in Mr. Kantor's memorandum, the statement appears:

'The question of retail recognition in this industry

is further complicated by the fact that a tire sale is rarely made at list price.'

Was this matter discussed and is that an accurate presentation of the facts?

"A. Yes, this matter was discussed, and I was inclined to agree with Mr. Kantor that it was very rare for a tire to be sold at list price. I must rather ruefully admit to making this statement in public. I had dealers write to me and say they did make sales at the list price, which surprised me.

"Q. The next sentence in the Kantor memorandum is:

'The extent of the discounts granted . . .' either 'by' or 'to'—it must be 'to a customer, ordinarily depends on a combination of the number of tires he buys and the competitive situation.'

Let me repeat that for the record: Because there is a preposition out of order. The phrase reads:

'The extent of the discounts granted to a customer ordinarily depends on a combination or the number
572 of tires he buys and the competitive situation.'

Is that first a matter that was discussed at the conferences with Mr. Kantor?

"A. Yes, we have talked about this. Of course, the sentence makes it implicit that this is a 50-50 combination, 50 percent one way and 50 percent the other. I don't think this necessarily follows.

I would say that the competitive situation is the governing factor basically on what price tires are sold at. The number of tires may have some influence on it, and probably do, but in some circumstances this would weigh to a very small degree.

"Q. Then already discussed with you on cross-examination is one of the phrases hereafter in the memorandum to the effect:

'Sales to "national accounts" were conceded to be non-

retail by the representatives of the National Tire Dealers and Recappers Association in our conferences with them. However, Mr. Marsh, the Executive Secretary of that group, urged incorporation of a definition of such accounts as "customers operating in more than three states
573 who have centralized billing." The difficulties this would provoke were pointed out and he did not pursue the matter further.'

The memorandum by Kantor continues:

'The evidence indicates that national account sales are not ordinarily made on a dealer's own account, but in behalf of the manufacturer. Also, these transactions are such a matter of common knowledge that the qualification "as known in the trade" now in the proposal needs no elaboration or clarification.'

I believe in response to a question on cross-examination you have already developed your disagreement with Mr. Kantor's observation that you on behalf of your Trade Association concede this business of national accounts being properly classified as non-retail sales.

I wonder, sir, if you would tell us just how it was that you offered the definition or sought to have a definition of national sales, national accounts, incorporated, and what the background of that offering by you was.

"A. Well, it certainly would seem that in the matter of national accounts that we had some historical background for the definition of national accounts, and that this
574 should not be too hard to clarify. The paragraph however, is a contradiction within itself inasmuch as it points out that I said 'customers operating in more than three states who have centralized billing,' end of my statement. It goes on, 'The difficulties this would provoke were pointed out and he did not pursue the matter further.'

Then down below it says, 'Also these transactions are

such a matter of common knowledge that the qualification "as known in the trade" now in the proposal needs no elaboration or clarification.'

Well, these two don't necessarily hang together, because they do operate in more than one state. They do have centralized billing. This does make it a national account.

As I pointed out earlier, by virtue of a law suit within this industry and some restrictions on the growth of national account sales and the fact that we are limited to doing anything about it, by consent decree, the whole problem of national accounts is not a matter that deserves a great deal of debate and argument as far as we are concerned, so if conceding is just simply withdrawing from the matter, letting it go, I suppose that is what we did.

575 "Q. You were asked, I think on cross-examination on at least one occasion, perhaps more, about the regulations which were formulated on the basis of suggestions made by you, at least in part, prior to the issuance of those regulations by the Labor Department.

Would you tell us, sir, what had transpired, what the nature of the discussions and conferences were up to the time when you did submit some recommendations or did agree to go over whatever regulations the Labor Department already had in the works?

I am asking whether or not this represented a change of attitude on your part about the regulations or I think you indicated in your testimony that it was simply the acceptance of the inevitable. I believe I am paraphrasing you correctly.

"A. I wouldn't want these to be called suggestions because they were far from that. They were more realistically corrections or amendments to a proposal. As I pointed out earlier, we felt that the phrase, 'as recognized in industry,' covered the subject, was well understood and would be understood by tire dealers everywhere.

576 In all of the time that elapsed since the discussions first started and the day that the final interpretation was brought out, there was nothing that we found in the field, not even so much as one thing in my memory, that would have changed my mind in this regard, but as I pointed out earlier, the Labor Department said that this must have further clarification and that would therefore have to have some interpretative rule of the tire industry as they have had in other industries, therefore, we would have an interpretative bulletin about the tire business.

At this point you are faced with several choices. One, to—as I pointed out, select some likely tire dealer and go to court about it. This is certainly not a choice for a Trade Association to make.

Secondly, we could just go back here and wash our hands of it and forget it. However, to do that would mean that we could get something that would just be really very bad for us, so at that point we did what we thought was the wisest course of action and something that has marked our relationship to the Labor Department, and I hope other Government agencies as well, in that we tried to sit down and come up with the best sort of a program we could under the circumstances.

577 "Q. I believe, Mr. Marsh, you were also asked on cross-examination whether or not in your opinion the officials at the Labor Department, specifically the Wage and Hour Division, gave due consideration to the recommendations that you made and the writings that you submitted, some at least of which—perhaps all of which—are made exhibits to your testimony, and I am not sure I caught your answer.

What in your opinion was the nature of the acceptance or consideration given the suggestions you made in writing and otherwise by or on behalf of your Trade Association?

"A. Well, I would have to answer that in parts. One, in the matter of retreading, they were very solicitous and very interested, and as nearly as I can remember almost in its entirety they accepted the recommendations that we had made on the retreading industry, and this matter was resolved without any problem whatsoever.

On the matter of classification of sales and its relationship, whether it is a retail or wholesale sale, this was a matter of disagreement from, I think the record states 1950 on, and while our relationships with the Department were most pleasant, and while our conferences were well attended and all the evidence that we could
578 possibly supply was submitted, the fact still remains we got an interpretive bulletin and didn't get what we wanted.

"Q. Were other sources than your own writings and recommendations and development of facts brought out during the conferences as you recall it that were in conflict with your own suggestions and recommendations?

"A. Not that I know of. I have reason to believe from what I was told by the Department of Labor that they had also solicited the views of several or many or all of the tire manufacturers. How many, I do not know. We pursued our own course in this as we have in all other matters independent of their activities.

I had one or two telephone conversations with interested people at the manufacturer level and I had reason to believe from what I was told that they shared our view. However, I have no proof of that.

"Q. Well, let's assume that the manufacturer's representatives did share your views as to definitions and classifications and sales in the tire industry.

Were any opposing or contending views to those expressed by you on behalf of your Association brought out or discussed at the conferences with Mr. Kantor and others?

"A. Mr. Mitchell, there were none brought out and
579 none discussed. Whether there were any opposing views, I do not know.

"Q. Then the chronology and history that is represented by your testimony and borne out by your exhibits reflect a rejection of the views in the industry as expressed through you on behalf of your Association and its dealers without, to your knowledge, any contrary expression from the industry having been heard by the Labor Department?

"A. Quite truthfully, Mr. Mitchell, I would be reluctant to answer that if the full text of the question was asked. I am not sure I am qualified to answer that.

Mr. Ray: I think it might be pointed out, as shown in the publication in the Federal Register at least, opportunity was given to any interested parties to make comments.

Mr. Mitchell: Yes.

By Mr. Mitchell:

"Q. My question I believe, in context, and certainly in intent, was meant to be confined to the conferences you had prior to the publication of the regulations with Mr. Kantor and others at the Labor Department, and I was asking as to what you did know of contrary or contending views opposite your own and to those of your Asso-
580 ciation, based entirely, of course, on what was developed for you at such conferences.

"A. I know of no one, at least from the industry, that opposed this point of view. They were certainly none of our rank and file of membership who opposed this view. We explored the thing, and as it shows, there was plenty of time here to explore it to the fullest. We felt that what we had recommended represented pretty much the unanimity of thought of our tire dealers. That is about as far as I could go as far as an expression is concerned.

* * * * * * *

585 **MRS. VIRGINIA LAUDERDALE,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Mitchell:

Q. Mrs. Lauderdale, would you state what your position is with defendant, Steepleton General Tire Company?

A. I am Office Manager, in addition to Secretary and Treasurer of the corporation.

Q. For how long have you held the position of Secretary and Treasurer of the company and also been employed as the Office Manager?

A. Since May of '45.

Q. As part of the proof in this case, the gross receipts of sales and services for the corporation has come in, the figure of $903,520.00, I think it is—yes, $903,520.00.

Do you agree that that is gross receipts from sales and services by Steepleton General Tire Company during the calendar year 1960?

A. Yes, sir.

Q. Considerable discussion has been devoted to the national account transactions in tire dealing.

Are you familiar with same by reason of your em-
586 ployment at Steepleton General Tire Company?

A. Yes, sir.

Q. Are national account transactions reported by Steepleton General Tire Company as a part of the regular sales and as a part of the regular receivables of that company?

A. No, sir.

Q. Would you explain how a national account transaction is handled for bookkeeping or record purposes, and if you know, how is it handled as a matter of sales and merchandise by Steepleton General Tire Company?

A. National accounts, as far as we are concerned—our national accounts deliveries are not sales. We make the delivery for General Tire and Rubber Company, in which we have a national account delivery receipt which is filled out and sent to the company, and they in turn issue us credit for this merchandise.

As far as our records are concerned, it is entered on a daily summary of sales, and an amount of cost of the tire is credited against the purchases, and the delivery commissions—the commissions earned.

Q. Is some kind of thing taken so you can check back against the purchase orders to know actually the details—

to ascertain the cost of the particular tire delivered
587 by Steepleton to the General Tire customers, cost of that very same tire so entered on that memorandum which you described.

A. Yes, sir. That is the reason we put it on our invoice. Those invoices we refer to as sold to General Tire and Rubber Company are only a matter of record as far as we are concerned.

Naturally, we couldn't keep up with the tire unless some record is made of it, so it is put on our invoice for a record purpose only.

Q. And do you also have a record as to the particular customer of General Tire & Rubber Company to whom the delivery is made on a ledger account as General Tire & Rubber Company, made Plaintiff's Exhibit 9 in this case?

A. Yes, sir.

Q. And the handwritten part in next to the far right column indicates the one to whom delivery is made?

A. That is the name of the customer to whom General will bill the merchandise. And that is put on so that we can check those as credit issued from General, and indicating who from, or whose name credited to.

Q. Then, there is a figure on the national account deliv-

ery transactions by Steepleton General Tire Company in
1960 in this record, was not quite approximately one
588 hundred fifteen thousand dollars.

Did that come from those white ledger cards, to your knowledge.

A. Yes.

Q. As a matter of fact, are two or three, perhaps several entries on those thirteen ledger cards I believe made composite Exhibit 9 which are not in fact national account transactions?

A. Yes, sir, occasionally we returned a tire to General for some reason, or maybe they borrowed one, or one that we did not particularly need and credit was extended on the same. And it is put in there again as a matter of record. That is a record account and not an accounts receivable.

Q. So, if the total of these transactions or these ledger entries and what-not which are made by Mr. Micklish should turn out to be the one hundred fifteen thousand that is already in the record for national account deliveries by Steepleton, that is the maximum and in fact would be some amount slightly less than that?

A. That is correct.

Q. And in this one hundred fifteen thousand dollar
figure, is there supposed to be an amount against
589 that of your purchases adjustment, the inventory
adjustment, which is the recovery of cost by Steepleton General Tire Company—is that included in the one hundred fifteen thousand?

A. You mean the commission we get?

Q. No, not the commission. The recovery of inventory cost.

A. Yes.

Q. Is that included in the one hundred fifteen?

A. Yes, that is right.

Q. Is any income there received, anything other than purchase adjustment cost of Steepleton General Tire Company?

A. Never at any time, only purchase on the general account. We receive no money, anything, from General; get a credit there to us for the amount of the tire credited it back.

Q. A credit to purchases, which you testified is an adjustment of cost of goods sold has nothing to do with income?

A. No.

Q. The only part that is income is the part of the commission or payment of some sort made for delivery and rendering the service.

A. That is right.

Q. That will be very small, frequently five or seven percent, perhaps, of the one hundred fifteen thousand dollar figure?

596 A. That is right.

Q. I think you already indicated, and in fact, that Steepleton does not consider that in any wise sale, services—or one of your services?

A. It is not a sale. It is a delivery record only.

Q. Was this same explanation you just testified given Mr. Micklish on more than one occasion when an audit was being made of Steepleton Tire Company's records in this case?

A. Yes, that is right.

Mr. Mitchell: I believe that is all.

I beg your pardon, just a minute.

Q. Was this Tennessee sales tax at the rate of three percent figure collected at all on national account transactions by Steepleton Tire?

A. No, sir.

Q. Or was it during 1960?

A. No.

Q. As a matter of fact, does Steepleton General Tire Company or anybody connected with it have any knowledge of the value at which the customer of General Tire & Rubber Company buys the product?

A. No, sir.

591 Q. Since sales tax has to be computed on the basis of the sales price, you could not even fix or impose or compute the sales tax?

A. Correct.

Q. Are transactions known as national account taken into account or excluded from the total when any volume bonus is computed for the amount of goods purchased or handled by Steepleton General Tire Company as a credit against General Tire & Rubber Company, the Akron Company?

A. That is right.

Q. And if you follow me and not get confused, my question was this. The point is that national account transactions are excluded from the computation of volume bonus arrangement by the Steepleton Company?

A. They are deducted before we qualify for it.

Mr. Mitchell: Thank you.

**Cross-Examination,**

By Mr. Tincher:

Q. Mrs. Lauderdale, in regard to the deliveries made by your company to General Tire & Rubber Company national account customers, is the commission for

592 such deliveries the same, regardless of how long you may have had the tire in stock that is delivered to the customer?

A. Yes, sir, the commission is set by General Tire & Rubber Company, and it may vary from time to time over the period of a year. But at that particular time, it was whatever it was.

Q. Well, some of the tires which you deliver are tires which have already been paid for by Steepleton Tire Company, paid to General Tire & Rubber Company, is that right?

A. It could be.

Q. And on those tires, of course the Steepleton General Tire Company has had its money tied up in inventory stock for a period of time, hasn't it?

A. If I follow your question, you mean that that is a tire that we had already purchased and paid for?

Mr. Tincher: Yes.

A. (Continuing) Of course, I would have no way of knowing which tire we are going to deliver, whether it is one we had paid for or whether one we had not paid for at the time.

Q. But, in any event, when delivery is made, the serial number off the tire is noted on the invoice, and then you relate that number back to your purchase order in order to determine and to advise General Tire & Rubber

593 Company which merchandise you delivered?

A. No, sir, no tire is delivered from General by serial number.

Q. I believe you just explained in answer to Mr. Mitchell's question that you do relate the transaction back to your inventory, your stock number.

A. That is the stock number, not the serial number.

Q. Perhaps I misunderstood you. How else would you identify the particular merchandise that you had delivered by a stock movement number if the serial number was not indicated?

A. Stock movement number is on the invoice, the date on which that particular tire might have been purchased, but it does not mean that the serial number would appear on General's invoice. It would be impossible for them to bill us by serial numbers.

Q. But would it not be necessary for the Steepleton Tire Company to identify, either by a serial number or some other number, so that you would be able to check from your stock movement records the particular merchandise that had been delivered to one of the national account customers?

A. They ask for a stock movement number, on which we have to verify prices. That is, if there has been a price change since the purchase of the tire or during that
594 time, because they credit us at the time for that current price.

Q. They credit you with the price you paid for the merchandise, or the price that that comparable merchandise is being billed to Steepleton Tire Company at the time of delivery for?

A. Putting the stock movement number on there has not always been our practice. It has been in the last—recently because of competition in prices making it necessary, and because of price changes. In other words, prices change so often that it is hard to keep up with what you pay for one tire or for another.

Mr. Tincher: I wish to file at this time, if the Court please, the deposition which was taken of this witness, Mrs. Lauderdale, on January 3, 1962.

Mr. Mitchell: Do I understand you want to file it?

Mr. Tincher: Yes, just file it, part of the record.

Mr. Mitchell: Well, in the Clerk's office it can be filed at any time.

Mr. Ray: Treat it as read.

595 Mr. Mitchell: I don't know whether you need to treat it as read. You have got the witness right here. If there is some inconsistency here——

If it is filed, then we have no objection at all.

Mr. Tincher: Well, as I recall, the formalities with respect to filing were waived at the time the deposition was taken.

Mr. Mitchell: Yes.

Mr. Tincher: So, for that purpose, we now lodge it with the Clerk, if Your Honor please, as a part of the record on the case—in the case, that is.

Mr. Mitchell: Let me understand what it is you want done.

Do you expect this to be evidence, now it is filed? Is that the connotation you had?

Mr. Tincher: I wish it to be part of the record in the case, yes, for such use as is legitimate of it.

Mr. Burch: Now, if Your Honor please, if Mr.
596 Tincher expects to develop at any time any inconsistency between the deposition of the witness, in fairness both to the Court and to the witness he ought to do it while the witness is on the stand.

Now, it would not be right after this witness has left the stand for Mr. Tincher to say, "Well, on her former testimony she said so-and-so," and developed some inconsistency of which there might be a perfectly rational explanation.

If that is the purpose of it, that ought to be made known now.

The Court: There is merit in counsel's observation at this time.

The pre-trial deposition ordinarily is used for impeachment purposes. And if you are saying now or have in mind now that there is a change in her testimony or it has varied in some particular, the fair thing would be, I believe, to call it to her attention now so she might clear it up, give her an opportunity to explain any discrepancy in her testimony.

Mr. Tincher: Oh——

The Court: You do have a right to offer that
597 pre-trial deposition.

It is admissible for any purpose, I believe under the rules.

Mr. Tincher: Under the rules——

The Court: But in fairness, if there is some discrepancy, it is well to develop it at this time.

Do you claim, Mr. Tincher——

Mr. Tincher: No.

The Court: She hasn't testified but very briefly here.

Mr. Tincher: I am not offering it for that purpose, if Your Honor please, and as far as I know, there is nothing in the record inconsistent with her testimony today.

I think it does add clarification with reference to matters that have come into it, such as pricing.

And I had in mind next offering in evidence as an exhibit the price catalog concerning which Mrs. Lauderdale did make some comments and explanation at the time of her deposition.

The Court: Well, then, you are using that deposi-
598 tion in lieu of the examination at this time? Is that what your purpose——?

Mr. Tincher: That is the primary purpose.

The Court: That is your primary purpose?

Mr. Tincher: Yes, Your Honor.

The Court: To save time, for one thing.

Mr. Tincher: Rather than to retract and go over the same material that has been covered previously.

The Court: Well, that sounds reasonable.

By Mr. Tincher:

Q. For clarification, Mrs. Lauderdale, you have read your deposition and you have noted, I suppose, that the reporter listed you as Miss Virginia Lauderdale, did you not, on this deposition?

A. Yes, sir.

Q. But that is the deposition you gave, as reported, on January 3, 1962?

A. Yes, sir.

Q. Now, would you glance at this price catalog and

determine whether that is the one which you referred to at the time of your deposition?

599 A. This appears to be the same one you handed me at that time.

Mr. Tincher: I wish to offer that as Plaintiff's Exhibit number 12.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 12, and same will be found among the exhibits in the cause.)

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600 **DEPOSITION OF MRS. VIRGINIA LAUDERDALE.**

* * * * * * * *

601 **Direct Examination**

By Mr. Tincher:

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603 "A. We have what we call a daily summary of sales on which each invoice is listed and set up according to passenger tires, truck tires, service, or what it might be.

"Q. I will show you here a sheet which is called daily summary of sales and collections. This was made Exhibit No. 4 to Mr. Zaveson's deposition in Akron. Is your daily summary sheet similar to that?

"A. Yes, sir.

"Q. Is that the form that you use?

"A. Yes, sir.

"Q. I don't find any place on the daily summary sheet that you have identified for listing the customer's name. Is that done anywhere other than on the sales invoice?

"A. That is listed by invoice number. That sheet
604 is listed by invoice number.

"Q. The invoice number is recorded on the daily summary sheet?

"A. Yes, sir.

"Q. Then I take it you can go back from the daily summary sheet and pick out the various invoices and determine who the customer was and the unit price that was charged for the products he bought?

"A. That is correct.

"Q. Normally will one daily summary sheet be sufficient for a recapitulation of all your day's sales, or does it some times take more than one?

"A. It sometimes makes more.

"Q. And I believe the sales tickets then are kept for a period of several years?

"A. Yes, sir.

"Q. Are they filed by days or by weeks or by months or how?

"A. By months.

"Q. Could you give me just a rough approximation of how many of those daily sales tickets would be filed in an average month?

"A. It would vary, of course, according to the
605 length of the month and the number of sales. That could run from 1,200 to 2,000.

"Q. It would be a great, big job for somebody if he goes to analyze all the sales tickets?

"A. Indeed it would.

"Q. You wouldn't volunteer for that job, of course?

"A. No, sir.

"Q. When is the daily summary sheet prepared, Miss Lauderdale, for the day?

"A. The following day, yes, sir.

"Q. And then I assume that all the sales which are not cash sales are written on some accounts receivable ledger?

"A. That is correct.

"Q. When is that done?

"A. Immediately following the listing on the daily summary of sales.

"Q. That again, I take it, would be done from the sales ticket?

"A. That is correct.

"Q. The accounts receivable ledger will not show the unit price of any particular item sold, will they?

"A. No, sir.

"Q. Simply the customer's name, address, and the
606 amount of the sale, is that the information?

"A. And the invoice number.

"Q. And the invoice number?

"A. And the date.

"Q. Do you yourself prepare the daily summary sheet or the accounts receivable ledger?

"A. No, sir, I do not.

"Q. Then each month a State of Tennessee sales tax return is prepared for the company, is it not?

"A. Yes, sir.

"Q. Who prepared that?

"A. I do.

"Q. Could you tell us what basic records you use in compiling the information for your sales tax returns?

"A. On the daily summary of sales, as each invoice is posted in a column on that, we set aside for sales tax. The sales tax is listed then per invoice, and that total is picked up at the end of the month.

"Q. Whereabouts on the daily summary sheet would you normally record the sales tax?

"A. This is the back side. Of course, this is a double sheet, as you understand, when it comes over like that, and since we have no—here is the column for sales tax.

"Q. Column 622, I take it, the sum of your entries
607 in this daily summary sheet would have no sales tax?

"A. That is correct.

"Q. And that is simply left blank if there is no sales tax collected?

"A. That is correct.

"Q. Do you issue the instructions to salesmen and service men with respect to what sales will involve a collection of a sales tax and what will not?

"A. Not daily. That, of course, was done at the time the sales tax went into effect, and then if there is any question, I try to determine whether or not——

"Q. And each new employee who makes sales would be instructed, I suppose?

"A. That is correct.

"Q. Do you review the sales tickets from time to time for the purpose of determining whether a sales tax has been properly computed and charged in appropriate sales and whether sales where no sales tax was collected was appropriate?

"A. I do occasionally, and the accounts receivable checks each of those at the same time she checks the invoice.

"Q. And is she instructed to be on the lookout for improper collection of state sales tax or failing to collect it?

608 "A. She is.

"Q. Now, just so we will both be talking about the same thing, I will hand you a form, State 3, which is the taxpayer's copy. This is not a completed form, but is just a form which we can talk about, the state sales tax return.

Mr. Mitchell: Pardon me. May I see that?

Mr. Tincher: Yes, surely. (Form examined by counsel.)

Mr. Mitchell: All right, sir.

"Q. And before I get into that, perhaps it would facilitate things if we take the company's copies of these sales tax returns which you brought with you.

"A. (Witness produces state tax returns and hands them to Mr. Tincher for examination.)

"Q. Now, Miss Lauderdale, in Item 1 where you list gross sales and/or gross rental proceeds, do you get that figure from—or just let me ask you how do you derive the figure which you enter there for Item 1?

"A. From the daily summary of sales.

"Q. And do you make that tabulation, or does someone else?

"A. No, the accounts receivable bookkeeper, it is from her total.

609 "Q. And that would be a total of the daily summaries which have been made for the month?

"A. That's right.

"Q. I notice here in the return for November, 1960, Item 2, cost of purchased products purchased on a resale certificate for use by you, an item of $155.07. I don't expect you to remember what that item is, but could you tell me the nature of that, what type of transaction that would be?

"A. I don't recall offhand. Some places, of course, would charge the sales tax, and it would not be an item for resale. I believe that probably is small weights which go on a tire. The company does not charge us for those, and the weight is included in the price of balancing the wheels, so we pay the tax on the weights as purchased.

"Q. Now, in some of these returns, a sizeable amount is entered in Item 2. I note, for example, in August 1960 $3,064.42. Might that be some product such as Steepleton general products sells and carries in stock for resale, but would be used in the business, such as tires on your own service trucks?

"A. No.

"Q. It would not have been included?

610 "A. No. sir.

"Q. Is there a place in this return for you to show such merchandise that is used in the business?

"A. The next item is your use tax, any that we might use.

"Q. Then your company would include all of the merchandise which it uses in the business in this Item 3?

"A. That's right.

"Q. And on that item, I take it, you then pay to the State of Tennessee the sales tax which would be the same amount that you would pay if you went out and bought those products from some other dealer?

"A. Our use tax, as the term might be.

"Q. It is a three percent tax the same as the sales tax?

"A. Yes, sir.

"Q. Then under Item 5 there are a number of classifications which are termed 'allowable deductions'. 5-A is sales for resale and/or further processing, and can you tell me where you get the information that enables you to enter a total under that item?

"A. We carry a separate ledger on businesses which might have resale, for reselling merchandise for which they purchase.

"Q. Would that be businesses which have their own sales tax account number?

"A. Yes. We carry a file of all of them that have
611 to have—in the file we have a copy of their exemption certificate from them.

"Q. And in the normal course of business, are there very many in that category?

"A. No, sir, we have very few.

"Q. When a sale is made to one of those dealers or businesses, does the salesman require that particular dealer to show his sales account number, or just how does the salesman know that on that account he is not charging sales tax?

"A. We have so few of them, it is easy for them to know. In most of the cases, it is just something a service

station or something like that that might be picking up a tire or two for resale, and they come into the office and check with me on the file that we carry on exemption certificates.

"Q. All right. Item 5-E, sales and bonafide commissions, how do you determine which sales will be included in that category?

"A. There again we have so few of those it is easy. We attach a bill of lading to the back of any invoice that we happen to make a shipment out of town, which averages so few it would be easy for anybody to keep up with them.

* * * * * * * *

614 Q. Item 5-F is stated to be 'Sales to states, counties, municipalities, or Federal Government'. Are those sales all tax exempt under the Tennessee State sales tax law?

"A. That is correct.

"Q. And no sales tax is collected?

"A. That is correct.

"Q. Would you explain under the other deductions which are listed on the back recapping sales?

615 "A. Recapping tires under the State of Tennessee is not taxable by sales tax.

"Q. Would it be different if the tires are recapped and put in stock by your company and then sold to customers?

"A. That's right.

"Q. There is still no sales tax?

"A. No, there is a sales tax then.

"Q. There is?

"A. That's right.

"Q. Do you have any sales in that category?

"A. Do we have any, or is there any shown on here, do you mean?

"Q. Does the company make such sales?

"A. Yes, sir.

"Q. And where would those sales be included in your sales tax return?

"A. Well, they just would fall in the total before—after deductions come off.

"Q. All right. They are included in the gross sales and no deduction is taken, is that right?

"A. That's right.

"Q. Could you estimate the approximate percent-
616 age or proportion of your recapping business which would fall into that category?

"A. No, sir, I could not.

"Q. Would it be a small percentage or a large percentage of your recapping business?

"A. I would say small.

"Q. Your next item on other deductions is 'WB and Alignment', which I take it to be wheel balancing and alignment?

"A. That's right.

"Q. Is that also exempt from the state sales tax?

"A. Yes, sir, under the State of Tennessee law.

"Q. And service sales, what does that include?

"A. Like a charge for making a service trip.

"Q. Miss Lauderdale, in your position as office manager do you assist the salesmen or any others in the organization in computing discounts that are allowed on various sales of tires and tubes?

"A. Not as a rule.

"Q. Do you from time to time do that?

"A. If the specific emergency situation arose and I had to, would be about the only occasion.

"Q. You are familiar with the price lists, the code prices and how to determine which is which?

617 "A. Yes, sir.

(Off-the-record discussion.)

"Q. Is this the type of price list which is normally used in making sales at your establishment? (Showing witness a booklet).

"A. Yes, sir.

"Q. Can you from looking at that tell whether that was in effect during 1960?

"A. The dates are shown on the price list.

"Q. And the date on Page 1 of the sheet marked 210-A shows an effective date of February 16, 1960, is that right?

"A. Yes, sir.

"Q. Just turning to Page 2 of this sheet that is designated 210-A, I notice back here rayon which has been written through and General Air Tyrex is shown, tubeless, first. Is that a first line tire of the General Tire Company?

"A. It is.

"Q. And 40 percent has been written in there. Is that a discount, or tell us what the 40 percent is.

"A. I do not know who wrote it in there.

"Q. Well, I don't either, but is the 40 percent a normal figure for you to have written on your price list?

"A. It is not a normal figure, no, sir.

618 Mr. Mitchell: Let the record reflect, if you are not going to make that an exhibit, that the 40 percent to which you referred is written in in either pen and ink or something other than or contrary to the printed material.

Mr. Tincher: Yes, this 40 percent is written with red pencil.

"Q. Going down to the Item 750.14 4-ply, what is the list price of that friction tubeless tire?

"A. $34.30.

"Q. Now, can you tell me from that what the code price is?

"A. This is the code price (indicating).

"Q. You are pointing to Figure 27E79. Now, is that a price of $27.79 indicated for the code price?

"A. That's right.

"Q. And by the same token, 800.14 tire, the list price, $37.60 would have a price of $30.46?

"A. That's right.

"Q. Now, is that code price, Miss Lauderdale, the price that one of your dealers would pay to Steepleton General Tire Company for this tire?

"A. That code price shown on there is General's code price. We do not use that.

619 "Q. Would you use a lower figure or a higher figure than that in selling to one of your dealers?

Mr. Mitchell: I beg the form of the question at this point. I do not know that it is going to establish by this testimony—certainly not by this lady's testimony—that they have dealers.

Mr. Tincher: I believe she has already testified about these sales for resale such as a service station. That is what I had in mind.

"Q. A sale to a service station, would the price to the service station be greater or less than this code price?

"A. It would possibly be less.

"Q. Now, would your price to United Taxi Company, for example, be greater or less than this code price if they bought that tire?

"A. Well, as I remember the code from just looking there, I would say it would be a little less than that, yes, sir. I didn't notice the difference in that; I don't pay much attention to the code since we do not use it.

"Q. Do you use the list price in making sales to average individuals who would come by to buy one tire or a set of tires for their own personal automobile?

620 "A. That's right.

"Q. You use the list price?

"A. That's right.

"Q. Do you have customers who buy tires—— (interrupted).

"A. I didn't—excuse me a minute—I didn't mean that they were going to pay that price. There may be a discount allowed from that, but we use that as the base.

"Q. In what way would the discount be determined for an individual customer?

"A. Mr. Steepleton and the salesman determine the discount. That doesn't come under my jurisdiction.

"Q. You would perhaps look at the ticket after it was done?

"A. Yes, sir.

"Q. And in checking those tickets, can you say what the average or a normal basis of discount for the individual tire purchaser has been?

"A. You mean can I take the ticket and figure it?

"Q. No. I mean do you recall what was a normal discount for the individual purchaser?

"A. There isn't such a thing as a normal discount in the tire business. It can be one thing one time and one thing another, according to whatever the situation hap-
621 pens to arise, the competition. So many things can determine that cost. There isn't such a thing as the one price, according to the way I would see it.

"Q. In other words, even though this same price list might be in use for several weeks or months, from day to day this figure might be used in working a discount from the list price?

"A. It is entirely possible.

"Q. Was that the practice in 1960, as you recall it?

"A. Well, it is always necessary, I would say, in the moving of a commodity of this kind.

"Q. Now, from the same price list, I will turn to Page 2, or the sheet marked KC 133 relating to truck tires and

tubes, and this has an effective date of December 7, 1960. Let's go over and take one of the common sizes of your truck tires, 1020 HCR Caravan being an item of truck tires that you would sell frequently?

"A. Yes, sir.

"Q. For a 12-ply tire of the 1020 HCR Caravan, a list price of $196.95 is shown, a code of 121T58. Does that code indicate a code price of $121.58?

"A. Yes, sir.

622 "Q. That again, I take it, is General Tire Company's code price and not necessarily the price at which Steepleton General Tire would sell this?

"A. In truck tires we do use the code.

"Q. You do?

"A. Some in determining the prices.

"Q. Now, would that code price be the normal price that Steepleton would have sold this tire in December of 1960 to an individual truck operator?

"A. You are using the term 'normal' again to describe prices, and in the tire business there isn't a normal price.

"Q. Can you explain the manner in which the code price is used as you have indicated?

"A. Well, the code can be used as the base, and there are times when you might use one 10 percent, three 10's, four 10's. As I said, it has to be according to the situation, the customer, competition, any dozens of things can influence the price that is necessary to meet in order to sell.

"Q. But in any event, the code price, $120.58, rather than the list price of $196.95 would be the take-off point?

"A. There are times when the list price is used as the determining basis.

623 "Q. Do you know what determines whether the list price or code price is used as a starting point?

"A. No. There again, as I said, the pricing doesn't

get too much in my line. I just—I can check the invoices afterwards and tell what has been done, but so far as determining the price, I don't do that.

"Q. In the same day might you see an invoice where it was figured at three 10's from the code price and another invoice where it was figured four 10's or five 10's from this list price?

"A. It is possible.

"Q. You wouldn't be surprised to find that happened in any particular day as you looked over the invoices?

"A. It could happen.

"Q. Now, would you be able to say whether or not one type of customer got his purchase price figured from the code price, whereas a different type of customer had his figured from the list price?

"A. If I take it and figure it, I could determine it.

"Q. Would you be able normally to look at the invoice and tell which way it was done?

"A. You mean just looking at the invoice?

624 "Q. Yes, from the price that was put on there could you tell whether the selling price had been computed from the list or from the code?

"A. Generally speaking, I should from looking at so many of them.

"Q. Is it the usual thing for that sales ticket to show either the code price or the list price and then show a discount?

"A. No, sir. The discounts are, as a rule, not shown on the invoice.

"Q. Usually the invoice shows only the price to the customer?

"A. That is correct.

"Q. Plus any taxes and so forth?

"A. That is correct.

"Q. Do you know of any short cut method by which

the amount of discount on any particular sale can be determined by looking at the invoice?

"A. No, I don't believe I do.

"Q. So far as you know, would it be necessary to take the invoice and compare it with the price list that was in effect at that particular time in order to determine what discount was allowed?

625 "A. Yes, I would have to do that.

"Q. I am afraid Mr. Mitchell will, too. Miss Lauderdale, where in your sales tax returns do you show the receipts which Steepleton General Tire obtained from General Tire & Rubber Company in the form of commissions on national account sales?

"A. I don't understand that.

"Q. Do you list on your sales tax returns the commission which Steepleton General Tire Company obtains from General Tire & Rubber Company for handling the business of the national accounts?

"A. No, sir.

"Q. That is not included at all?

"A. No, sir.

"Q. Where do you include that in your gross earnings or gross receipts to show the income?

"A. Commission earned.

"Q. What books or records will reflect that?

"A. It is carried on the daily summary of sales and then carried forward to the general ledger on commissions earned as set forth under added income.

"Q. And I assume that it is included in your gross revenues for Federal income tax purposes?

"A. Yes, sir. That is only a commission and has

626 no bearing on the sales.

"Q. All right. Would you point out on the daily summary sheet where it is carried?

"A. Over here under miscellaneous debits and credits.

She lists it here in the account number above the name 'Commission earned' and the credit to 'Commission earned'.

"Q. In sales to the state, the City of Memphis, and various counties, I understand that General Tire & Rubber Company pays your company a commission over and above the amount which you collect from the county or city or the state for a sales tax. Is that commission shown on your daily summary also as a commission earned?

"A. Not on the daily summary, no, sir.

"Q. Where would it show in your records?

"A. On this recap of the General Tire invoices.

"Q. Is it included in your over-all gross receipts for Federal income tax purposes?

"A. Yes, sir.

"Q. Is it listed or treated as a commission rather than as a profit?

"A. Yes, sir.

"Q. But it is carried in a different account than commissions which are obtained from servicing the national accounts?

627 "A. No, they are the same.

"Q. In the same account?

"A. Yes, sir, all under commissions earned.

"Q. What other types of transactions by Steepleton Tire Company result in commissions that would be listed in that account?

"A. I don't believe I think of any other, tax received from General or commissions on delivery for national accounts. That is the only two I think of offhand.

"Q. Are there some in a special category where sales are made with the approval of General Tire Company at less than your price, your billing price, for example, where a competitive price has been approved in advance and

then a 10 percent allowance is made there to adjust your price? Do you know whether that is carried as a commission here?

"A. No, that is only to adjust the price, and it is just credited to the purchase price.

"Q. That is credited to your account with General Tire Company?

"A. That's right.

"Q. By General Tire?

"A. That's right.

"Q. Is that in any way carried as income by Steepleton Tire Company?

628 "A. If they give us back only the difference in the cost, it would just be cost equalization and would not have been any income.

"Q. Among the national accounts which your company serves, I believe are some manufacturers on which your commission is lower than fleet accounts, is that right?

"A. Yes, sir.

"Q. Do you also supply any oil companies under the national account arrangement?

"A. No, sir, not that I know of.

"Q. To go back just a little bit, I believe I understood from your testimony that your sales for resale include only those to dealers who have filed with you a state sales tax account number, is that correct or not?

"A. If they are purchasing new merchandise, they would have to. Occasionally maybe this same service station might have a tire recapped on which there is no sales tax involved. They might not have one on file.

"Q. And are you able to sell to various used car dealers, for example, recapped tires which they will place on cars they want to sell without having to list that as a sale for resale?

"A. You mean in selling to used tire dealers?

"Q. No, used car dealers.

629 "A. And what did you say about them?

"Q. Would you list that sale under Item 5-A as a sale for resale, or would you list it over on the back as a recapping sale?

"A. Some used car dealers prefer to pay the tax, because they are selling the car as a unit and not the tires separately. I don't know but one or two that we sell like that, and I think the best I recall is they prefer to pay their sales tax because they are selling the car as a unit and the tires, not as a tire. If they don't pay the sales tax, it would come under the ones for resale.

"Q. Do I understand correctly that if you sell a recapped tire to an individual, you do not charge a retail sales tax?

"A. A recapped tire?

"Q. Yes, from stock.

"A. Yes, we do charge.

"Q. You do charge sales tax, and if you sold such a tire to a used car dealer who preferred to pay the tax, he would pay it, but if he had an account number, then you would sell it free of sales tax, is that correct?

"A. That is correct.

630 "Q. In other words, your category of sales for resale as shown in Item 5-A would not necessarily cover all sales by Steepleton Tire Company of merchandise which was intended to be resold?

"A. I don't follow you.

"Q. You have some merchandise which you collect the sales tax on which is still intended for resale, is that correct? For example, to used car dealers who are going to put them on a car and sell them?

"A. They consider they are purchasing the tires to go on an automobile and they are selling the car. They are not selling the tires as such; therefore, it is not for resale.

"Q. You would not include it in this column under 5-A?

"A. No.

"Q. As a sale for resale?

"A. No.

"Q. And that sometimes happens, I assume, from the way you have described the business?

"A. I can remember of one instance that brought that to mind.

"Q. And in the normal course of your business, if it can be used as normal in this manner, you do make
631 sales to dealers who do not pay a sales tax on tires which will be put on vehicles and resold?

"A. Of course, once we sell the tire, what they do with it, we have no way of knowing.

"Q. For example, Road Builders Equipment Company, I believe they take in used equipment on sales of new equipment, and then they resell their used equipment. Now, in some instances when they have recapping done of tires for their used equipment, would you charge them a sales tax on such tires or not?

"A. If they have the tires off the equipment recapped, there is no sales tax on recapping.

"Q. Then that would be listed under your recapping sales, would it not?

"A. That is right.

"Q. And among your recapping sales then would be included the tires such as those for Road Builders Equipment Company which were intended to be put on used equipment and resold?

"A. Well, recapping does not involve sales tax one way or another; it wouldn't matter.

"Q. Well, now that was a long way around to get around to the question which you didn't understand a moment ago, that some of the sales to purchasers
632 which are to be resold are not included and, of course, are not required to be included in your

Item 5-A on the sales tax return. Now, could you confirm that?

"A. Well, of course, if Road Builders—you are using that as an example—if they sent some tires up there to be recapped and just recapped and returned to them, whether they put them back on this used equipment, sales tax is not involved one way or another, so, of course, I would have no way of knowing, and, of course, it really doesn't matter to us whether they are going to resell them or not because it is just a matter of recapping tires and returning them to them, and whether they put them back on the used equipment, I wouldn't have any way of knowing.

"Q. And if they are put on used equipment to be resold, that would still not be included in your 5-A, Item 5-A on your sales tax return, would it?

"A. Well, I am afraid I am not making it clear. I wouldn't know what they do with them or whether they sell them or what. Of course, when I make that out for that month, no, it is not. We just recapped some tires, and we recapped them and returned them.

"Q. That is the answer I wanted to get, but if it
633 did happen, it would not have been included in your column for sales for resale?

"A. No, it would be under recapping.

* * * * * * *

637 **SWAYNE LATHAM,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Burch:

Q. You are Mr. Swayne Latham?

A. Yes, sir.

Q. What is your business, Mr. Latham?

A. What is that?

Q. What is your business?

A. Tire business, retail tire business.

Q. How long have you been in that business?

A. About forty-two years.

Q. Just for the record, give us some of your history in the tire business, your background, the various phases that you know about that you have been in.

A. Well, I went with Goodrich Company in '21 as a tire salesman. Then I was branch manager for them from '24 to '27.

At that time I went into the retail tire business, had one place at Union and Cleveland for a good many years, and during the course of time operated about six or
638 seven different businesses.

We eventually have closed them or sold them to Goodrich Company, until at the present time we have one small business out in North Memphis.

Q. You operated for many years a very large store right there on Union and——?

A. We had a good sized establishment at Union and Cleveland, then at Second and Vance. We were doing about a two million dollar retail business.

Q. Two million dollars a year?

A. A year.

Q. What I want to ask you about principally—you have covered it already—and that is the nature of the retail business.

Do you think you know what is retail as distinguished from wholesale, as considered in the tire industry?

A. I would say so, yes.

Q. You have had an opportunity to learn it the hard way, have you not?

A. Yes.

Q. Mr. Latham, what is the distinguishing difference

between retail and non-retail or wholesale in the tire
639 Industry?

A. Well, in our particular method of bookkeeping —and I think it is accepted pretty well in the industry— that if we made a sale to another dealer, a smaller dealer, for the purpose of resale, and in breaking down our sales we considered that a wholesale sale.

Everything else was either commercial, or national account, or retail, or Federal or municipal government. But the only thing that we carried at all as wholesale was the sale to another dealer, where we had to have an exemption certificate, and he makes the sale to the ultimate consumer.

Q. Is everything else retail?

A. It is in our method of keeping books, yes.

Q. Now, is your method general in the industry, as far as you know?

A. I would say so, because we adopted it from the Goodrich Company from experience, and they operate some five or six hundred stores.

Q. So, if you would sell a tire to Joe Doakes Tire Company for resale, that is as wholesale?

A. Yes, sir.

Q. If you sell a tire to XYZ Tire Company for
640 resale, they furnish you with an exemption certificate so you didn't have to collect sales tax, that is wholesale, right?

A. That is right.

Q. But if you sell to Gordons Transport Company to put on their truck and use, that is retail?

A. Right.

Q. If you make a delivery to—let's say the Greyhound Bus Line through a national account, that is retail?

A. Yes.

Q. So, everything that is to be resold is wholesale, and everything that is to be used by the purchaser is retail?

A. That is what I understand.

Q. Now, do you know of any other classifications of wholesale and retail that has ever been created in the tire industry in the thirty-eight years which you have been in it?

Mr. Ray: Forty.

Mr. Burch: Forty.

A. No, other than the fact that we do occasionally—there have been times through the years when the manufacturer carried an account on our books. In other words, we won't solicit the account. We will just usually, in other words——

Q. That is what you call a national account?

A. That is right.

641 Q. That is not a sale of your own?

A. No, it would be a sale by the manufacturer, and we simply act as delivery agent and are given a commission, a commission for delivering the sale.

Q. As a matter of fact, many times in doing so you did not even know what the price charged by the manufacturer was, did you?

A. We knew it many times was cheaper than we could buy them.

Q. But you could not collect sales tax on this because——

A. We could not buy them at that, I think.

Q. You weren't concerned with credit or price?

A. We weren't concerned with credit or price, just tell us to make deliveries of so many tires, such and such tires.

Q. Do you know Mr. Steepleton of Steepleton Tire Company?

A. I do.

Q. Is that a competitor tire company, has been a competitor tire company during the many years you have been in business?

A. Plenty of them.

Q. You have made it a practice to know something about your competitors and the way they operate?

A. Yes.

Q. Are they or not a retail establishment as considered in the tire industry?

642 A. We consider them strictly retail, yes, sir.

Mr. Burch: All right.

**Cross-Examination,**

By Mr. Tincher:

Q. Are you still affiliated with the Goodrich Tire & Rubber Company, Mr. Latham?

A. What is that?

Q. Are you still affiliated in your business operations with Goodrich Tire & Rubber Company?

A. We handle Goodrich tires, yes.

Q. How big a territory does your company operate in?

A. It is about a little three or four block community.

Q. And do a two million dollar business a year?

A. No, that was when we had several big places. They have all been sold to the Goodrich Company.

Q. Oh. That is not the territory where you operated as a two million dollar concern.

Now, Goodrich Tire & Rubber Company operates a number of retail outlets of its own?

A. That is right.

Q. And how big an operation do you have at the present?

A. About a quarter million, including appliances,

643 television, radios, and such.

Q. In your present operation, do you carry any auto parts and accessories, and so forth?

A. We carry a few incidental small stuff as feeder to bring people into the place.

Q. Spark plugs, seat cushions, batteries, windshield wipers, and seat belts, things of that nature?

A. We do.

Q. Do you at present have any sub-dealers to whom you supply tires?

A. No.

Q. Do you have any fleet accounts at this time?

A. No.

Q. Do you supply tires to any national accounts?

A. No.

Q. The Goodrich Tire & Rubber Company is of course, I presume—is now handled through the Goodrich store?

A. Goodrich store.

Q. How long has it been since you supplied a national account of Goodrich Tire & Rubber Company?

A. We sold our last sizeable business to them in
644 1958. That was at Union and Cleveland.

Q. Is your business at present primarily one of dealing with individual owners of passenger vehicles?

A. Yes.

Q. This purchasing system that you formerly used, in which, as I understand your testimony, you carried those sales to dealers and sub-dealers as wholesale sales, and all other sales as retail sales—was that bookkeeping system set up by the Goodrich Tire & Rubber Company for you?

A. I believe so. Yes, we adopted their method of bookkeeping.

Q. Now, in that system which you described, you mentioned the fact that there were commercial accounts, national accounts, and Government accounts, and so forth. Were those carried in a break-down under this broad grouping that you have made of consumer sales?

A. Strictly, our breakdown would strictly have been retail, either passenger or truck tires—retail tire sales, either passenger or truck.

Q. In your bookkeeping arrangement, was the ledger sheet on which you made such a report or monthly
645 report form headed in any of its columns or divisions as retail?

A. Certainly, we have retail tires, passenger cars, retail trucks, wholesale passenger, wholesale truck.

Mr. Tincher: Yes, sir.

A. (Continuing) Just speaking strictly of the tire business.

Q. Those divisions or break-downs were shown on the forms?

A. Every statement that we got up, which was once a month, an operating statement and a balance sheet and a sales control.

Q. With reference to the truck tire sales, did you have a commercial listing or a heading for such sales to be entered?

A. No, it was strictly retail sales.

Q. Did you at the time you were operating on this larger scale, before you have sold your multiple outlets that you operated, did you have any commercial tire salesmen who went out and called on various businesses?

A. We did.

Q. Were they termed commercial salesmen in your organization?

A. Commercial salesmen.

Q. Did you at the same time have some salesmen at your place of business who waited on the drop-in trade?

A. Yes.

Q. Were they termed your retail salesmen?

A. Yes, that is right.

646 Q. Did those retail salesmen make any sales of truck tires?

A. Oh, yes, certainly.

Q. Did they make any sales to the fleet account customers that you had?

A. Yes. There was no difference when you say commercial salesmen, because we gave them certain lists of commercial accounts to call on, they are away from the store all the time. When they are in the store, they operate exactly the same as retail salesmen at the store. In fact, they would relieve the inside people for lunch and different things and operate together.

Q. In other words, they were familiar with all phases of the business?

A. That is right.

Q. But I take it your retail salesmen would not as a rule be sent out to make calls on fleet customers?

A. No, they primarily are in the business. If we would get a quick call, and somebody wanted to talk to a man and could not reach a commercial salesman, we would send one of these men out. They were of course qualified and know the line.

647 Q. Did the Goodrich Company supply you with—for the fleet accounts—the commercial salesmen operating out on the field to call on customers—did Goodrich Tire & Rubber Company supply you with suggested prices and tire catalogs for the use of the customers?

A. There have always been list prices, of course, list price for dealers and prices which were—then, well, the more trucks—and here is the part of it, for the tires, if a man had twenty trucks he would get this price, if he had fifty he would get another price.

Q. And those arrangements, I take it, provide for discounts to be given from list price to those fleet account customers?

A. Yes, there was no—well, there have been a lot in forty years, been all sorts of prices and sheets. And at one time we had all those commercial price lists, different color to commercial. What you are doing is take the retail price and discount from it, if you say so many tens, and got the basis of nine tens and a five.

Q. Multiple percentages of five or ten percent from the list price?

A. Right.

Mr. Tincher: I believe that is all.

648 **Redirect Examination,**

By Mr. Burch:

Q. Mr. Latham, during all those years, whatever the discount system, whatever the prices paid, whatever the color of the price list, if it has been used it has been classed as a retail sale, has it not?

A. That is right.

Q. And not retail is wholesale sale?

A. That is right.

Q. Was that system prevailing before the year 1949, would you know?

A. Oh, yes, I would.

Q. It has been for the whole forty years, as far as you can remember, has it not?

A. That is right.

Q. It is nothing that the industry has thought up to answer Mr. Tincher in this or any other lawsuit, is it?

A. No.

Q. As a matter of fact, the classification that the tire industry uses is exactly the same as the State of Tennessee in its sales tax law uses, is it not?

If it is for resale, you don't collect it. If it is for use, you have got to collect it.

649 A. I would say so, yes.

Q. Now, you have been in this business forty years, Mr. Latham. You remember back in '30 and '31 and '32, when we were all sort of broke and the Government had the blue eagle and the NRA, do you remember that?

A. I do.

Q. You remember that?

A. I do.

Q. You remember back in the NRA, the Government encouraged the people in industry to get together and form what they call industry codes, do you recall that?

A. I do.

Q. Do you recall that the classification of NRA, and that is your National Recovery Act, was exactly the same issued by the industry, that if it was to the user it was retail, and if it was to a reseller it was wholesale?

A. I couldn't say positively, but that is my recollection, because we haven't changed our system.

Q. Well, in forty years, have you ever known any classification in the industry other than if it is purchased by a user it is retail, and if it is a reseller it is wholesale?

A. That is my understanding of it, yes.

Mr. Burch: That is all.

650 **Recross-Examination,**

By Mr. Tincher:

Q. One further question on that point, Mr. Latham.

If I understand your theory, that you state there had been this commercial classification, which included sales to fleet accounts, national accounts, and governments?

A. That is right.

Mr. Tincher: That is all.

**Redirect Examination,**

By Mr. Burch:

Q. I did not understand you to say that a commercial sale is other than a retail sale.

A. It is—the last sale is a retail sale.

* * * * * * *

651 **WILLIAM O. STURDIVANT,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Burch:

Q. Would you state your full name for the record?

A. William O. Sturdivant.

Q. Mr. Sturdivant, what is your business?

A. I am employed by the Memphis Publishing Company, the publishers of the Commercial Appeal and the Press-Scimitar.

Q. What is the average daily circulation of both of those papers, Mr. Sturdivant, just roughly?

A. Combined, three hundred sixty-nine thousand.

Q. Are those papers the principal daily advertising media in this area?

A. That is right, sir.

Q. Now, do you have different rates for wholesale and retail establishments?

A. Yes, we have what we call the general advertising rates and retail advertising rates. That is in addition to classified rates.

Q. Now, what generally classifies a retail establishment to entitle it to take that rate?

Now, before you answer that, let me withdraw that
652 question.

Is the general rate higher or lower than the retail rate?

A. The general rate is higher—considerably higher in most cases.

Q. So, to get a cheaper rate, you have got to satisfy the Commercial Appeal or Press-Scimitar, and particularly Mr. Sturdivant, that you are a retail establishment to entitle you to a cheaper rate, do you not?

A. That is right.

Q. What does it take to satisfy you, or how do you make the classification as to what is a retail establishment?

A. Well, we define a retail advertiser as one who operates a retail store or a group of retail stores operating under the same name or association.

Q. Now, in the advertising part of the tire business, have you accepted the Steepleton Tire Company as a retail establishment?

A. Yes, we have.

Q. And does it advertise and does it get the cheaper retail rate?

A. That's right.

653 Q. Now, Mr. Sturdivant, I have here an audit report of the Commercial Appeal and the Memphis Press-Scimitar for the twelve months ending March 31, 1961, and I will ask you to look at it, and look at the second page of it particularly.

Now, before I will ask you this question, I will ask you one that sounds remarkably stupid, but we frequently have to ask it.

Memphis is in the State of Tennessee, is located in the southwest corner of the State of Tennessee, is it not?

A. That is right.

Q. And it is within half a mile of the State of Arkansas, and within three or four miles of the State of Mississippi, is it not?

A. Yes.

Q. Now, how is the retail trading area of the City of Memphis described in the audit report of your papers that we have in this area?

A. Well, it is described as the—first, as the retail trading zone of Memphis, and includes approximately thirty-three counties located in West Tennessee and North Mississippi and East Arkansas.

Q. Would you make that an exhibit—Exhibit F.

654 A. If you like, I could read the boundaries.

Q. Will you read it, now.

A. All right. Our agreed rates I referred to, which extend north to Blytheville, Arkansas, northeast to Tiptonville, Tennessee, east to Bolivar, Tennessee, southeast to Pontotoc, that is, to Nozel, Mississippi, southwest to Gunnison, Mississippi, to Mellwood, Arkansas, also to Forrest City, Arkansas, northwest to Jonesboro, Arkansas. And it includes, with the exception of the city zones in Tennessee, the counties of Crockett, Dyer, Fayette, Hardeman, Haywood, Lauderdale, and Gibson, Shelby, Tipton. And in Madison County, we consider the county division there Huntersville and Medon.

In Arkansas, the counties of Craighead, Crittenden, Cross, Lee, Mississippi, Phillips, Poinsett, and St. Francis.

In Mississippi, the counties of Alcorn, Benton, Coahoma, DeSoto, LaFayette, Marshall, Quitman, Tallahatchie, Tate, Tippah, Tunica, Yalobusha.

In Union County, Beats 1 to 4, inclusive.

In Pontotoc County, Beats 1 to 4, inclusive.

In Bolivar County, Beats 1 and 3.

Q. Now, Mr. Sturdivant, just ask you a fact you know better than I, and around the whole area hereof,

655 not to ask you all the details, you see, but considering you called out Blytheville, and Coahoma County such as Clarksdale is the county seat, and generally like that, would you say that the retail zone was a radius roughly one hundred miles from Memphis? Would that be close, Mr. Sturdivant?

A. Fairly close. In some cases it would be somewhat less, I mean, as far as going over in Arkansas is concerned.

Mr. Burch: You may question.

**Cross-Examination,**

By Mr. Tincher:

Q. Mr. Sturdivant, would you give us a few examples of the type of wholesalers that carry advertising in your newspapers at the higher rates you have mentioned?

A. Well McGregor's would be one. This is appliance distributors.

Mr. Tincher: Yes, sir.

A. (Continuing) McDonald Brothers and Shobe, Incorporated. They carry what—carry our general rate, as they are distributors.

Q. Now, would you state first whether any of those have retail outlets as well as being in the wholesale distributing business?

656

A. As far as I know, they have no retail outlets that they own themselves. They sell to regular appliance dealers.

Q. To the extent that the appliance dealers are identified with their particular brand name of products, I take it the appliance dealer would get some profits from their advertising.

A. That is right.

Q. Do you have any advertisers who are identified, in so far as your department of the newspaper is concerned, as both engaged in wholesale and in retail distribution?

A. Well, that would be rather difficult.

Q. For example, does the Firestone Tire & Rubber Company——

A. Oh——

Q. (Continuing) ——carry advertising in your newspapers?

A. Yes, we carry advertising from the Firestone stores, which run retail, and we occasionally carry advertising from Firestone Rubber Company which carries the general advertising rate.

Q. All right. When you carry it for the Firestone stores, would more than one of those stores be listed and named in the advertising?

657 A. Well, they generally carry—Firestone stores will carry their addresses under there at the bottom of the advertisement.

Q. Yes, sir. And there will be a number of such outlets, won't there?

A. Yes, sir.

Q. Now, are you aware——

Now, first let me ask you whether those advertisements are carried on your newspaper under the retail category at the lower rate?

A. Yes, advertisements of that kind are.

Q. Well, are you aware that those Firestone stores not only are selling to members of the general public, but are also distributing to sub-dealers such as filling stations and other dealers and garages that are in another category?

A. We interpret the Firestone stores as being retail establishments and accordingly accept their advertising at the retail rate.

Mr. Burch: If Your Honor please, I don't believe there is a line of proof in this record that any Firestone store distributes to resellers. There may be.

Q. The next question, Mr. Sturdivant, is: In

658 carrying those advertisements for the Firestone stores, are you nevertheless aware that those stores are a part of the Firestone distribution system, and that they do sell tires to various service stations and garages for resale?

A. No, I don't believe that we are aware of that at all. And——

Q. Would it make any difference in the rate you would charge them if you were aware of that fact?

A. Well, if other stores were listed other than the—

what we call the Firestone Service Stores, and if they listed all their dealers all the way through, such an item would take what we call our general rate.

Q. But as long as they list only the stores that carry the name Firestone store, then I take it you are willing to carry their advertisement at the retail rate?

A. Yes, that is right.

Q. Would the same thing be true with reference to Goodrich Tire & Rubber Company stores?

A. That is right. We carry advertising for them under the name of Goodrich Service Store, I believe, or Goodyear Service Store. I forgot which one you mentioned there.

Q. And both the Goodrich stores and Goodyear
659 stores are able to carry their advertising in your newspapers under the retail rate, notwithstanding that in addition to selling to members of the general public, they also may sell to service stations and garages for resale?

A. Yes, sir.

Q. Now, are you aware that Steepleton General Tire Company makes sales of tires to dealers and garages for resale?

A. No, we are not aware of that. We consider Steepleton Tire Company as being a retailer, and have always considered him that way.

Q. Will you continue to carry Mr. Steepleton's advertisements and those of Steepleton General Tire Company at the retail rates, even though you learn that some portion of his business is made up of sales to dealers for resale?

A. Yes, I believe the appearance of the ad in the paper runs over the Steepleton signature—the tire company, and at his address, and as far as we are concerned that advertisement is inviting the public to come and buy tires at the Steepleton Tire Company.

Q. Yes, sir. In fact, the type of advertisement which Steepleton General Tire Company runs in your paper is alculated to reach the members of the general public and to induce them to come to the place of business and
60 buy tires, isn't it?

A. That is right.

Q. And the type of advertisement is not in your experience as an advertising man calculated to build the Steepleton Tire Company business with fleet owners who may buy tires for their trucks or earthmoving equipment, nd so forth?

A. Well, as far as the fleet owners are concerned, we eally don't understand about that phase of the business. But we consider Steepleton strictly—I mean under the etail—under our interpretation of what retail and eneral——

Q. Yes. In fact, I noted in your paper this week a ather large—perhaps quarter page or eighth page advertsement by Steepleton General Tire Company.

Are you familiar with the one that has been currently nning this week?

A. Not particularly. I have noticed the ad in there. I elieve he advertises most every week in the paper.

Q. The one in this week has relation to passenger tires xclusively, has it not? Are you aware——?

A. No. I noticed that. I always go through the paper. noticed he had an advertisement. I doubt if I completely read the advertisement.

Q. Well, if you remember, would it be correct to
61 say that generally speaking and predominantly the advertisements which the Steepleton General Tire ompany has been running in your newspaper—your two ewspapers—have been for passenger cars rather than or trucks and heavy equipment tires?

A. I am sorry, I am really not aware—generally prob-

ably would for passenger tires, but I am not sure whether the advertisements carried in our—I am with the newspaper, and must state I am a rather poor reader of newspaper ads. I look at the size of it and all that, but a lot of times don't read too carefully except when I am ready to buy something.

Q. I feel sure you have in your department others who work with that, with the detail and make up of the particular ad.

A. That is right.

Mr. Tincher: That is all.

**Redirect Examination,**

By Mr. Burch:

Q. Mr. Sturdivant, you know the meaning of the word "preponderately", don't you?

A. Yes.

Q. You would agree with me that a man could take
662 a drink and not be a drunkard?

A. That is right.

Q. Similarly, a retail establishment can make a wholesale sale but still be preponderately a retail establishment?

A. Yes.

Q. Now, is it your understanding, and do you charge accordingly, that Steepleton Tire Company is preponderately a retail establishment?

Mr. Tincher: Objection, if Your Honor please. He is asking, as I understand——

Mr. Burch: I sure am.

Mr. Tincher: And that unless he lays the predicate for what this understanding is based on——

Mr. Burch: The test is known in the industry. And the gentleman who is handling the advertising of the industry and knows in the industry it is retail, as such —and charged accordingly as a retail establishment, that is a test established by the law.

The answer does not suit the Government, but that is the law there.

663 The Court: The Court will permit him to answer.

Q. Is it known and accepted by the industry, your advertising committee, so far as the use cited to you, as a retailer?

A. Yes, I would say that definitely in our definition of Steepleton Tire Company.

Mr. Burch: Thank you.

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664 **RICHIE I. BRUNSKILL,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Burch:

Q. Mr. Brunskill?

A. Yes, sir.

Q. State your full name.

A. Richie I. Brunskill.

Q. Mr. Brunskill, what is your occupation or business?

A. I am District Manager with the General Tire & Rubber Company.

Q. Now, how does General Tire & Rubber Company conduct its merchandising in Memphis and Shelby County, Tennessee?

A. Through our distributor, Steepleton General Tire Company.

Q. They handle the whole business of General Tire Company here in Memphis?

A. With the exception of manufacturer sales and sales made to national accounts, yes, sir.

Q. Now, how long have you been in the tire business?

A. For ten years.

Q. Always in Memphis and Shelby County?

A. No, sir. I have been here since—from in 1958.

665 Q. And where were you before that?

A. Prior to that I was at Houston, and was there for approximately six to seven years.

Q. Do you know, in addition to your own business, the way your competitors generally conduct their business in different areas, and particularly in this area?

A. I am familiar with it, yes, sir.

Q. You had better be familiar with it, hadn't you?

A. Yes, sir.

Q. Now, I want you to tell me what is the basis of the retail classification, and what is the basis of the wholesale classification in the tire industry in Memphis and Shelby County, Tennessee.

A. We classify a sale that is made to the ultimate consumer as a retail sale.

Anything that is a sale that is made and the purchase of the individual—for the purpose of resale, we classify as a wholesale sale.

Q. Do you know of any other classifications except that?

A. No, sir, I don't.

Q. In the tire industry, not only with your own company, but with competitors, have you ever heard of any?

A. No, sir.

666 Q. Now, I want to ask you generally about these so called national accounts.

Do you know how they are handled?

A. Yes, sir, they are handled by our factory.

Q. Just tell me how they are handled, just briefly, handled there.

A. Well, take a large firm like General Foods which do business there nation-wide. Their business with our company is handled at the home office in New York. The billing is handled, the price structure is handled, and we have no knowledge—I should say the dealers have no knowledge what that price arrangement is.

We in turn issue cards to these individuals of the company who have occasion in a company owned vehicle when they need tires. Their authorization given the distributor dealer. And upon seeing that they are national account and authorized, our dealer is authorized to deliver them the merchandise.

An appropriate national account form is written up, and issued by the company—we in turn issue credit for the purchase price that the merchandise costs, plus a small delivery charge.

And that goes to the national account billing.

667 It is a national account sale, not a dealer's sale.

Q. The dealer have anything to do with fixing the price?

A. No, sir.

Q. No contractual relationship whatever between the dealer and the customer?

A. No, handled by the home office.

Q. The dealer is not concerned with the credit of the customer in any way?

A. No, sir.

Q. No contract is ever made at any time between the customer and the dealer?

A. No.

Q. The whole contractual relationship is between the customer and the company, in your case General Tire Company?

A. That is correct.

Q. And it is the General Tire Company who is concerned with the credit of the customer?

A. That is correct.

* * * * * * *

668 **Cross-Examination,**

By Mr. Tincher:

Q. Mr. Brunskill, since Mr. Burch has given some testimony here, to which you assented, in regard to the loan of tires by somebody to somebody else, let me get this clear.

Those loaned tires, they come in regard to these national account sales?

A. The merchandise is initially billed to the dealer. He owns it. It is his. We request the dealer to deliver merchandise to these national accounts, and upon verification of this delivery which is authorized by us,

669 of course we issue a credit for what he paid for the merchandise, plus this service charge.

Q. Does the dealer get that tire back eventually that he has delivered to a General Tire Company customer?

A. Based on his turn-over, yes, sir, sure he does. He buys as he needs. And this is a function for the General Tire and Rubber Company.

Q. Perhaps you misunderstood my question.

Now, does Mr. Steepleton, to be specific, get back the tire you said he had loaned to some national account customer of General Tire & Rubber Company?

A. Well, he had not loaned them, let's say, to the customer. He has loaned them to General Tire & Rubber Company. This just is more or less a return of merchandise. Most of this merchandise they buy in accordance with the popular sizes, he is willing to carry in his inventory anyway.

Q. Yes. But he does not get back the same tire he has delivered to the customer?

A. The same size tire. No, couldn't give him back the same tire, be impossible.

Q. He does not necessarily get back the same tire, the same quality in inventory too.

670 Does he necessarily get back the same size, grade——?

A. National accounts all buy current merchandise. They get no concessions in the way of—let's say discontinued merchandise. And it is only natural, and I would say yes, he would get back the same size and type tire. He would—that is what he would have to.

Q. Then he gets back what he re-orders rather than what General Tire and Rubber Company determines was the type of merchandise that he delivered to the customer, is that right?

A. Well, let's say this. The majority of our national accounts would buy the 100 Level tire, which is a first run tire, the Jet Air, and if it was to someone—they were in a hurry, they probably loan it, probably looked —everybody will carry those in inventory. The size—I forget the size. And he would definitely re-order Jet-Airs. But he just is rendering service.

Q. Well, he would re-order when his stock reaches the level that he feels in the exercise of good business judgment he needs to order more of those tires, is that right?

A. Generally they order between twenty and twenty-five. That is correct. Most all the dealers usually do, the dealers who have been——

671 Q. What he re-ordered, though, in other words, is determined by how many tires he sold during the month rather than on the basis of how many may be delivered to some national account customer, is that correct?

A. That is true, according to his movement, that is right.

Q. And his judgment to what he needs to replenish his stock?

A. That is true. That is true.

Q. Do you in any way maintain a record at your dis-

trict office concerning the volume of purchases by Steepleton General Tire Company?

A. We get a monthly report, yes, sir.

Q. From Mr. Steepleton?

A. No, sir.

Q. From the company?

A. Yes.

Q. From the company?

A. Right.

Q. Does that monthly report show the amount in dollar volume of his purchases for the period covered by the report?

A. Yes, sir, it does.

Q. Does that monthly report also show the dollar
672 volume in sales in the category of national account sales?

A. They are deducted from his volume, yes, sir.

Q. Are they shown in some other category?

A. Wholesaler's report, yes, sir.

I am not sure for those years—yes.

National account sales were deducted from his volume. They are not even credited to his purchases, because they are handled by General Tire and Rubber Company.

Q. But they are shown in this monthly report, are they not, by dollar volume?

A. They should be deducted from his volume, yes, because he did not purchase the merchandise, theoretically.

Q. I believe you are trying to answer, sir, but you are not answering the question, Mr. Brunskill.

Are those national account sales by dollar volume shown on the monthly report?

A. Not as such. If a national account customer, you see, was deducted, and adjustments.

Anyway, this involves really no resale.

We deduct adjustments and also deduct national ac-

count deliveries, and also deduct deliveries to municipalities and things of that nature. And they are in a lump form, and there is no way could designate and say,
673 "This is national account there," no.

Q. Then, there are adjustments such as faulty merchandise that had to be taken back for a price adjustment, and any merchandise for some reason or other is taken out of sales stock?

A. Returned merchandise, things of that nature, are found in that category.

Q. In your experience in dealing with Steepleton General Tire Company, have you found that each month their monthly report will show purchases by Steepleton General Tire Company in dollar volume which exceeds these national account sales and other transactions that you group into the category where you say you are giving him credit?

A. You mean will his purchases exceed the amount of what we would deduct?

Mr. Tincher: Yes.

A. They always would, yes, sir. They always would because that is——

Q. Suppose for some particular period, Mr. Brunskill, after the Steepleton Tire Company has purchased a large volume of merchandise in one month, and during the next month he drops with reference to his purchases, but
674 he makes large quantities of national account sales or deliveries, if that actually exceeds the amount of his purchases for the month, how would that be handled, the accounting procedure of General Tire Company?

A. Well, a situation like that would never exist because his purchases would always exceed the small amount of credit extended against his purchases, because they are so minor.

Now, verification can be obtained very easily by examining—producing our sales reports. But that has never existed, never a period where he came close to his volume of purchases, in other words.

Q. In other words, then, his deliveries of tires and tubes—both truck tires and passenger tires for national account customers will not exceed his own purchases of tires from the General Tire & Rubber Company?

A. Oh, no. That includes adjustments, returned merchandise, and everything, would never exceed—not any month.

Mr. Tincher: That is all.

Mr. Burch: Thank you.

(Witness excused.)

675 The Court: Suppose we have a little break, gentlemen, about ten minutes.

(Recess.)

Mr. Burch: I would like to recall Mr. Brunskill a moment, Your Honor.

**RICHIE I. BRUNSKILL,**

the said witness, upon resuming the stand, testified further as follows:

**Redirect Examination,**

By Mr. Burch:

Q. Mr. Brunskill, I asked you in detail while you were on the stand before about your retail operations such as Mr. Steepleton is one of your retail dealers, but I neglected to ask you about the wholesale aspects of the dealer.

Do you have wholesale dealers?

A. Yes, sir, we do.

Q. How many dealers in all classes are there in your territory, wholesale and retail?

676 A. Totally are approximately two hundred.

Q. About how many of those are wholesale dealers?

A. Eleven.

Q. Now, to be a wholesale dealer, what do you have to do?

A. We have a form, which is called a one hundred percent wholesale application, which they must execute in triplicate, then it is approved by the home office, whereby we can extend them this price concession.

Q. Now, under that arrangement do they agree not to sell to any person who is not a reseller?

A. That is correct, they——

Q. Now, in consideration of that, do you make them a further reduced price as compared to the price you give the retail dealer?

A. That is correct, tires, tubes, batteries and accessories.

Q. The person who agrees not to sell except to resellers, and thereby qualifies himself as a wholesaler, how much cheaper can he buy than, say, Mr. Steepleton who sells the product to me, in other words.

A. Oh, the battery costs from ten or fifteen percent. The tires and tubes, two to three percent, as far as billing price.

677 Q. So these wholesalers can actually purchase that much below Steepleton?

A. That is correct.

Q. And on a volume of nearly one million dollars the testimony shows he does, that additional discount is real money, isn't it?

A. Yes.

Q. Probably in the aggregate of forty or fifty thousand dollars a year, putting everything in, would it not?

A. Yes, sir.

Q. So he pays that much more because he is a retailer?

A. That is correct.

Q. Now, has size got anything to do with it?

By that I mean, are many of your wholesalers smaller operators than Steepleton?

A. We have some that purchase less than twenty-five thousand dollars a year, so they are very much smaller.

Mr. Burch: That is all.

**Recross-Examination,**

By Mr. Tincher:

Q. Mr. Brunskill, would any of those smaller wholesalers that you just mentioned be in the nature of jobbers?

678

A. Yes, sir.

Q. Another term is manufacturer's representative, I believe?

A. In most cases they are all jobbers of consequence, like Reynolds Brothers at Union City, Fancher Oil Company at Fayette, Alabama, people in that category, but who had dealers that they sell from purchases—resell it.

Q. In carrying on their business, do they maintain a stock of your merchandise?

A. Yes, sir, they do.

Q. Do they maintain a stock of your merchandise, the dealers you have classified as General Tire & Rubber Company's wholesale dealers within your district, do any of those have a recapping tire trade or plant in connection with their business?

A. Some do, some don't.

Q. If they do recapping, are they permitted to do consumer recapping?

A. They in most cases are not. Through their dealers, if they have any retail outlets, they have a separate set of books to handle those transactions.

Q. And they can carry on both wholesale and retail business, but they have to maintain two separate
679 accounting records, is that correct?

A. That is correct, according to the agreement which we have with them, which they execute in triplicate and is in our file, yes, sir.

Q. Is there a certain designation for that type dealer like 2 double E—1 double E?

A. We classify it W. H.

Q. You classify it W. H.?

A. Our distributors are on the basis of billing prices, one, two, three. Then these are wholesale and W. H. And we do not make these prices available to our dealers, only to the W. H. accounts.

Q. Now, the classifications of dealers in the group Mr. Steepleton and his company belong to, what are those three designations you mentioned?

A. It is according to volume of business. If a man buys less than twenty-five thousand dollars worth of tires, he is on basis number one price.

If he buys in excess of fifty thousand, number two.

Over and above fifty thousand, be number three.

Q. Then Steepleton Tire Company would belong to your large classification?

680 A. That is right.

* * * * * * *

681 **DR. WARREN W. LEIGH,**

having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Mitchell:

Q. You are Dr. Warren W. Leigh?

A. That is right.

Q. The spelling of your name is L-e-i-g-h?

A. Correct.

Q. The "Doctor" is a title which you obtained by qualifying to hold the degree of Ph.D., is that correct?

A. That is correct.

Q. Where did you take your graduate work after you got your Master's degree?

A. I took my undergraduate degree at the University of Utah, and M.B.A., the first graduate degree, at Northwestern University, and Ph.D. at Northwestern University.

Q. I think all of us are familiar, of course, with the phrase so far as Ph.D.

The first graduate degree, the M.B.A., is Master of Business Administration?

A. Business Administration.

Q. You received both graduate degrees at Northwestern?

682 A. That is right.

Q. Now, tell us when you obtained the last, the Ph.D.?

A. 1936.

Q. Will you tell us what was your thesis for such that is submitted for the Doctor's?

A. If I recall the exact title, it was on "Distribution Problems of the Tire Industry."

Q. Now, then, Dr. Leigh, during the time you were preparing your thesis in connection with the distribution or marketing or related activities in the tire industry, and from that time in '36 and before, right on down to date, have you entertained and continued to entertain an interest and taken an active participation in the tire industry?

A. Yes, it has continued. The activity has been you

might say more or less because of my demands of my position interfering with it today, but I continue——

Q. Where is your home, Dr. Leigh?

A. Akron, Ohio.

Q. Akron, of course, is the rubber city of the United States. There are at least four of the larger tire manufacturers there and considerable other people and companies, in fact.

683 Why is your position up there, or what is your occupation in Akron.

A. Presently I am Dean of the College of Business Administration at the University of Akron and professor in business administration.

Q. For what period of time have you held the rank of Dean of Business Administration?

A. Since founding of the college in 1953.

Q. Prior to that, were you on the faculty of the Marketing and Economics Department at the University of Akron?

A. Yes, sir, I was connected with the University of Akron in 1926, and been there except for the war years continuously.

Q. And before you obtained the rank of Dean of the Business Administration school, I think you indicated you were professor of Marketing?

A. And head of the Commerce Department.

Q. And you retain that title now, do you not, sir?

A. Not head of the department because that department has now been enlarged and made into the college with the dean capacity.

Q. I believe I am correct in thinking, Doctor, that you have written extensively for trade journals in connection with the business—in respect to the tire industry

684 itself, and particularly tire retailers.

Will you tell me whether or not, sir, for a period

of time about 1936 and for a few years thereabouts you were on the staff called—the staff of a publication out of Akron called Tire Review?

A. That is right.

Q. For about what time during and after 1936 did you find and submit articles as one of the editors of that journal?

A. Oh, I can only estimate that, sir. I think until—quite continuously I believe until about 1940—'41, and then I went to Washington, and have been submitting some articles since for the other journals.

Q. But you are placing that here with reference to the beginning of the World War II period when your normal Akron activities were at least interrupted?

A. Yes.

Q. In connection with your position as an editor of this Tire Review, is it true you travelled extensively through the section and you concerned yourself with problems of the individual tire dealers in many places, and this was substantial, and many of them, is that right?

A. Yes, sir, regarding the industry from the retail-
685 ers' point of view in selling, pricing, retailing, et cetera.

Q. Now, then, you have indicated that your Akron activities were interrupted because of World War II.

Am I correct in thinking you held a position in respect to the rubber pricing and Rubber Pricing Unit with the Office of Price Administration during World War II?

A. Yes, I did.

Q. I have a run-down of that, and I believe it is correct, and I wish you would correct me if I am wrong—according to this you served in Washington in positions from 1941 through 1944 as a member of the Rubber Pricing Unit of OPA, I believe started as Deputy Rubber Director, then advanced to Supervisor of Tires and Tubes,

which is in the Rubber Director's office. At one point you also held title as Secretary of the Navy Rubber Surveying Committee. Then you were put in the Trade Relations Section of the Rubber Prices Branch. And I believe at the conclusion of your service with the OPA you were head of the Tire Prices Section, all of which is in the rubber pricing field.

A. No, sir, may I correct that?

Mr. Mitchell: If you would, sir.

686 A. (Continuing) That is practically inversed.

Q. Oh, it is practically inversed?

A. Yes. That is true, as I recall the price control economist with the Rubber Prices Branch. Then ultimately I became head of the Rubber Pricing Section of the OPA. And then we got immersed in some industry problems. I was given the heading of the Trade Relations Activity Branch. Then I went over to the Rubber Director's office as Supervisor of Tires and Tubes, and then subsequently became an assistant to the Deputy Rubber Director, and that was the final position.

Q. Yes. Thank you for that correction. It appears I did take it in something of inverse order.

In connection with your service in several capacities with the OPA, you were, I am sure—you did, I am sure, become familiar with the various publications, bulletins, classifications and definitions used for Office of Price Administration purposes?

A. And put out some of them.

Q. Yes, sir. Now in the deposition of W. W. Marsh—whose name I am sure is familiar to you, of course—an exhibit in testimony now by deposition having been read,

an exhibit as numbered specifically Exhibit D to

687 Mr. Marsh's testimony—and I am reading from page 3 and I will go over a little bit onto page 4 of that—and I want to know whether this dovetails and

is in accord with your recollection of the manner and method of sales classifications by the Office of Price Administration.

"The OPA price schedules were also prepared with the advice and assistance of members of the industry, and hence provide valid evidence of what the industry recognized as retail sales.

"Price Schedule No. 63, relating to Retail Prices for New Rubber Tires and Tubes, issued by the Office of Price Administration on December 30, 1941, provided in part as follows:

" 'When used in this Schedule, the term . . . "Sale at Retail" means any sale to a purchaser for use by such purchaser and not for resale'."

A. Yes, sir.

Q. (Continuing) ——of the OPA record?

"This definition or one similar to it, was continued through the history of OPA. Thus Revised Maximum Price Regulation 528, issued in 1945, the last
688 Regulation containing a definition of retail sales for the tire industry, provided:

" ' "Retail Sale" means sale to a buyer for his own use and not for resale'."

"Similarly, OPA price regulations for wholesale sales recognized that in the tire industry all sales for use are treated as retail sales. Thus Maximum Price Regulation No. 143, relating to Wholesale Prices for New Rubber Tires and Tubes, issued by the Office of Price Administration of May 14, 1942, provided:

" ' "Sale at wholesale" means any sale, other than a sale to a vehicle manufacturer for original equipment of such vehicle, except a sale at retail.

" ' "Sale at retail" means any sale to a purchaser for use by such purchaser and not for resale.'

"Again, a similar definition was continued throughout the history of OPA——"

And then there is a reference to the last regulation.

Now, then, I will ask you, as one with service in
689 connection with rubber prices and practices of the OPA, does that meaning that I have just read to you comport with your own recollection and your understanding of what was, in fact, approved on the part of the OPA?

A. As far as I recall. I don't recall the dates of the last issuance, whether I was there or not at that time.

May I correct that also? In April, '44, I served——

Mr. Mitchell: Sure.

A. (Continuing) Rather, through April, '44, if I recall the date.

Mr. Mitchell: Yes.

A. (Continuing) But as I recall the situation, we made no distinction except the basic one for resale as wholesale and for consumption or use was retail.

Q. In other words, we will have a two-part classification?

A. No breakdown.

Q. Sales for resales were wholesale, and the rest going to consumers or users are retail?

A. Yes.

Q. Now, the name Marsh is familiar to you, I am sure, Dr. Leigh, because, as a matter of fact, you all have been together at management conferences and various
690 and sundry seminars and forums for the attendance and instruction of tire dealers who are members of this trade association, sir?

A. I have known Marsh a long time.

Q. Will you give us a fairly brief outline of those seminars, the kind of instruction—the kind of teaching that you have done through Mr. Marsh's association for its members particularly prior to doing work on whatever

seminars may be held at Akron at your own university, and those you have attended and perhaps been on the staff of, I will say, at other places?

A. Prior to Mr. Marsh's activity in the National Association of Tire Dealers, I have gone out on regional conferences with him, then had quite extensive relations with Mr. Marsh in 1955, I believe it was, and at that time held regional conferences, and I had been out on some of the programs.

We instituted at the University of Akron a tire dealers' management program. And we had the assistance and cooperation of Mr. Marsh and his cohorts on that. In fact, he and I think one of the other men were on the program—one other man from there was on the program. But I am not sure about the second year or third, whether

691 that was the time the NTDRA began its particular effort and to plan a particular—and set up some management seminars of their own patterned after our program which we had pioneered there with the University of California, one at Georgia. We carried the program for five years. At the end of the fifth year, NTDRA were staging several—perhaps ten or twelve, maybe more, regional conferences where they bring in tire groups. Some of them I participated in and some I did not.

And due to these university programs at the University of Georgia, University of Southern California—not University of California, pardon me—well, our registration was falling off, we were getting no monetary support from the national association at all. We had to stand on our own feet. So we then discontinued while, as I understand the situation—I can't vouch for it—the National Association of Tire Dealers were sponsoring the other two programs.

Q. And in addition, Dr. Leigh, to these appearances or

lecturing or teaching that you have done at these formal seminars, have you also appeared on many occasions at regional and national meetings held by Mr. Marsh's NTDRA as the speaker or in some capacity.

692 A. Yes, I have attended a considerable number of them. And shortly after that, they instituted what they called the advanced management seminars in 1956, I think was the year, or '57, and I believe I have appeared on every one of those programs.

Those were primarily for the dealers that the larger dealers or else dealers that would be at one of these college seminars here or all the others for an advanced seminar.

Q. You mentioned the advanced tire dealers—advanced program.

I have here a folder which you have given me which illustrates the management program which was held under the auspices of the University of Akron, at Akron, Ohio. This one apparently dealt with the 1959 session of your program.

Is that this advanced management program to which you just referred?

A. No, that is our college program. We call it tire dealers management program, which was similar to those where I have mentioned—the University of Georgia—Southern California. But this advanced manage-

693 ment dealer was strictly a national altogether—A NTDRA program.

Q. Yes. I would like you——

A. (Continuing) ——For thirty or more other dealers that would appear at examination.

Q. I would like you, if you would, please, sir, make this an exhibit to your testimony, and that involves part of your program, as there appears?

A. Yes, sir.

(Thereupon said document was accordingly marked as Defendant's Exhibit U, and same will be found among the exhibits hereto.)

Mr. Mitchell: Do you want——

Mr. Tincher: No objection.

(Document examined by counsel.)

Q. Now, then, Dr. Leigh, as is shown on the inside of the cover of this, there are sponsors shown, among them six of the tire manufacturers, tire and rubber companies, —correction, seven—and then the National Tire Dealers and Retreaders Association.

I see on page 3, it would be, that you—your name is in first rank of the educational advisory committee for this 1949 program. And I take it that you have the same status with regard to others held at Akron?

694 A. That is right.

Q. Now, in each of those management conferences, the advanced meetings for dealers, they were attended, I am sure, as the name implies, by tire dealers proper. These were men who manage tire stores for the manufacturers and who were themselves dealers. And they came in order to present their problems and in order to have you and others on the seminar program help them facilitate their efficiency in their business?

A. Yes, sir. More correctly, perhaps, or specifically, primarily what the trade would call independent dealers rather than company store managers, and so on.

Q. All right, sir. And in connection with the company store managers, have you had experience over the past many years in conducting surveys or making studies that dealt with retailing by the manufacturers in the tire business in Akron or elsewhere? Have you made surveys and other work, Dr. Leigh?

A. Yes.

Q. At their request?

I believe to the extent your busy schedule permits,
695 you also serve as marketing or management consultant, do you not, separateiy and apart from your teaching capacities. And I take it from that you are available as consultant, not only for the tire industry, but generally?

A. Yes, I have been, although my work has been primarily in the field of tires or else petroleum products. And I have served other concerns and made studies for them, such as Montgomery-Ward, duPont, and so on.

Q. Dr. Leigh, what about appearance perhaps before Congressional committees in connection with marketing studies, particularly with reference to the tire industry studies? Have you had experience presenting material to them on one or more occasions?

A. I have presented materials to them, yes, sir. I have not appeared before them.

Q. And are those materials what you would have abstracted from studies you have made and which you have already testified about?

A. Yes, sir.

Q. And these were submitted presumably at the request of somebody on the committee or somebody getting the material?

A. Sometimes a dual distribution concerning some of them.

696 Q. What about publications, Doctor? I know you were kind enough to submit to me quite a list, Doctor, of your extensive publications.

Is the fact accurate or not to say your writings for trade journals or for technical journals, as well as for more general media—the number of articles over the period of time you have been teaching runs now I guess well over a hundred specific general articles, and that the vast majority of these are on tires, deal with cases

in the tire industry, and that the vast majority of those concern themselves with distribution for marketing purposes at this time?

A. Yes, I would say—something of a reasonable estimate, I would say fifty perhaps articles dealing with the tire business.

Q. Now, then, Dr. Leigh, based upon your long participation in teaching or rubbing shoulders with the tire dealers, I would like to ask you, sir, what in your opinion is the classification of sales recognized in the tire retail industry as between wholesale, retail, whatever the classifications may be?

A. Well, primarily two classes—the wholesale,
697 which are sales for resale, and consumer sales, which they call retail.

Q. Now, then, in respect to classifying a particular sale or transaction as a consumer or retail sale, does the price at which the sale is made, or the quantity sold, or the frequency with which a given purchaser may buy a certain size or type or tire, or the character of the purchaser —do any of these things—are any of these things given any account—that is, does it matter as long as the man that is buying the tires is a consumer, of the kind, type and frequency purchaser he is?

A. If I get the import of the question correctly, as long as he is a consumer he is a purchaser pretty generally and particularly at the retail, and the category and the number of tires—it would make a difference in the price, of course, because this industry has generally been characterized by quantity discounts, but he does not thereby get a wholesale price which is known as the structure of wholesale price.

Q. So, if he is a consumer, it continues to be in the industry recognition of retail sale?

A. As far as I know.

698 Q. Now, has this been true, according to your observation and your experience, your—as you say, rubbing shoulders with tire dealers all the way back to 1936 when you earned your Ph. D. thesis in this particular area, and does it continue to be true today?

A. I would say of my personal knowledge that I could vouch for it being more true then than I could vouch for it today because I haven't been out in the field quite to the same extent in the past few years working with tire dealers to the same extent. But previously, as I recall, I travelled up and down the country visiting retail dealers. There comes to mind a case in Milwaukee, for instance, where we were interviewing, the question came up, among other things, of Government sale. And as I recall that they were thrown in there and to my knowledge generally as retail sales.

But the only distinctions seemingly were those that we have mentioned. And I know generally in my going throughout the industry, the classifications have made no distinction on so-called commercial unit sales. If they were for use, were thrown in as retail sales.

Q. In what effect—is it or not so, Doctor, you mentioned to me coming to court just now, coming in from
699 the airport, that you are presently engaged in some collection of data and material on a project that you have underway at this time in which this process classification—that is a two-part classification?

A. I do.

Q. On one hand, sales for resales, being wholesale sales. On the other hand are sales to consumers, being retail sales.

This fundamental, and a current project of yours in this business?

Mr. Ray: If Your Honor please, this intelligent, well educated witness there does not need to have leading and suggestive questions asked to him.

The Court: Objection sustained.

Mr. Ray: And Mr. Mitchell's questions to him are all carried on in that vein.

The Court: Objection sustained.

Q. Dr. Leigh, would you tell us to what extent the classifications there shown of this same sort are found in the textbook or academic approach to marketing and distribution problems?

That is, what are some of the recognized texts and what are the marketing theory—the academic approach—
700 textbook approach, as opposed to what we have been talking about just now, which is recognition and practice in the tire retailing industry?

A. I take it that you are trying to draw a distinction here between wholesale and retail.

Mr. Mitchell: Precisely.

A. More theoretical.

Mr. Mitchell: Yes.

A. (Continuing) As contrasted in this industry.

Q. Up to now, then, my last few questions have been what is the practice in the tire retail industry. Now, if you will, I would like to talk to you on classifications—distinctions as they are described in textbooks and by marketing theories.

A. In speaking of wholesale, I have written a bit of it myself, not too much, although there was one article—oh, there back in 1936 or '37 or so in the industry.

But generally speaking, the distinction between wholesaling and retailing have not had the close consideration that they deserve.

There are two groups of authors. I think you can discriminate in that and name Beckman, Ingle and
701 Buzzell. And another gentleman who has been interested in some distinctions there, Rowe Alderson.

Q. May I have the last name?

A. R-o-w-e A-l-d-e-r-s-o-n.

Q. Who is——?

A. (Continuing) Perhaps I should say F. E. Clark, perhaps, and other writers in the earlier stages, which I think have done some pretty good writing.

I would like to start with Clark, if I might. There was a third distinction. As I recall, he entered three classes of marketing, which he called assemblization, outlet and dispersion. Then he tried to show how certain functions, deliveries, say, of its operation, are in the wholesale function, presumably was called assemblization. Also one handling goods in bulk, also procuring in bulk and moving on to either industrial consumers, which was in keeping with the historical understanding and general practices, as it were, and selling at volume prices, and so forth.

Now, Beckman and Ingle and Buzzell perhaps have carried the subject through more carefully than any authors I know of. And they attempt to distinguish between wholesale and retail. Most authors seemingly just
702 accept or lump in as retail small sales, consumer sales—that is, household consumer sales and all of those. On the other hand, resales—sales for resale, wholesale sales, and throw in and lump all sales to industry or so-called commercial sales or to institutional commercial establishments for use by those establishments, so-called business use, as wholesale sales without being—going beyond that. And they just throw that, so it is all gone.

The Census has been a more discriminating—what it has come to—I think it has followed more or less the theories of Beckman or Ingle's. I think Beckman and Ingle's the Census theory, since perhaps both were engaged in it, as I recall.

But it seems to me that I would go on the resale—of goods sold for resale purposes would be, of course, wholesale sale.

On the other hand, if some consumer sales, no question about it.

There might be some question—well, put it the other way.

I would not go on all—necessarily on all of commercial or institutional sales being—just because of that fact being wholesale.

703 Mr. Mitchell: Yes.

A. (Continuing) I would go a bit, rather, further, look to the nature of the wholesaling, because I think that it is a thought that is an adjustment, it is differential gear activity, and adjustment of volumes, adjustments to markets, and so on, so forth.

So, if there were small—particularly sales to commercial accounts, and in the general course of business I would draw the distinction particularly.

I don't think the machinery is set up to draw that distinction.

Q. Yes, sir. In the course of that discussion of the varying theories, the men that are exponents of the various approaches to the problem then from the theoretical, academic standpoint, you indicated that Dr. Beckman was closely connected with the census studies. Did you get the full benefit of the Standard Industrial Manual, sir? Or what those bulletins say, or what may be used by Government agencies in connection with census studies and such things, and such?

A. The S. I. C., or Standard Industrial Classifications, have used pretty generally as the theoretical definitions have changed as practices and conditions have

704 changed, kept up to date and used the market of the Bureau of Census, labor or helpwise.

Q. And I think you indicated this Dr. Beckman, who was one of the proponents of the line of the marketing

referred to is closely identified on census studies within the industry?

A. He served as consultant to the Census a long time. Dr. Ingle was at that time also engaged in it. It seems to me he was chief of the wholesale end. I wouldn't swear to it. But one in connection with the Commerce Department and one of the assistants in the Department of Commerce—that I think the assistant director of the Bureau of Domestic Commerce, it seems to me, or assistant director, it might have been, of the Census Bureau.

Q. I take it from what you have said about Dr. Beckman's close connection and perhaps authority in such matters, would it be a fact, Dr. Leigh, that the Industrial Classification Manual and some of the other data and approaches would be implementing his ideas and would further his general theories?

A. Well, they have some substitutions there and in the original—when the Census of Distribution was being
705 formulated, and Beckman and Ingle were the two longtime—and some other gentlemen that were in the marketing field. Now, who got or from where I can't say.

Mr. Mitchell: Yes, sir.

A. (Continuing) But as Beckman and Ingle have been recognized as authorities in that field, I suspect the interaction is apparent. But just what—whether they were the generators of the criteria or advisability, I know not. But they had a hand in the early formulation.

Q. Now, Dr. Leigh, from your knowledge of the tire retailing industry, is it susceptible to being put into these nice little even categories that you have described as being sort of even, at least, portrayed by the marketing theorists such as Beckman and the other men, Doctor, and use such things as price quantity discounts or some other price criteria that these gentlemen are responsible for?

A. Well, yes, we are alternately, as we work, more accurate and carefully—I suppose those things will develop, but the numerous tests there you would consider in connection with wholesale quantity price aspect and set up the business, the selling procedure, to whom they sell and advertise.

706 All of those would be factors and should be given consideration.

But the practice of the trade in most areas would make buying conceptural framework or you would expect to consider—now, it could apply—; I doubt that you could apply this conceptural framework in its entirety to any phase of the business, because of this gray area, and also it would be unrealistic perhaps to make the distinction.

But I might give one example, even though I have not conceded and admitted theoretically that all sales for business purposes were wholesale sales. One in a hardware store would have to distinguish the fellow that bought a hammer in every case, bought the same hammer, was he using it for household purposes or was he going to nail up his neighbor's fence, or something else? And like a fellow who might buy a tire that is for use on his car, or a salesman—if so, that would be a wholesale sale to you, and to me, if I were using it just for general purposes, it would be a retail sale.

And if one could carry it to the absurd length, in other words,—prohibitive from the consumer's standpoint.

707 But the broad standpoint, I think as time goes on certainly if we can differentiate these things more clearly, competitive factors will compel us perhaps to cut the line more clearly, probably, that the theorists have distinguished sharply enough and sufficiently clear classifications and groups where those demarcations can be made.

Q. Now, then, Dr. Leigh, I want to hand you a bulletin

that has come in and is marked as Exhibit 6 to the testimony of Micklish in this case, and I direct your attention to page 33, and perhaps some more on page 34 of that bulletin, and I want to ask you in connection with this—this just being an interpretative bulletin put out by the Department of Labor,—it has on it on the cover its title—Title 29, Part 779, Retail and Service Establishment and Related Exemptions, and it has there near the very—or at the very bottom of the last page—it is January, 1960, issue.

Now, then, Dr. Leigh, if you would, please, sir, turn to page 33 of that bulletin, and I would like to run down these classifications which are in this paragraph (b), which is at the lower part of the lefthand column on page 33. And my purpose in going through these with you at this time will be to ask you to analyze each
708 one of these subparagraphs numbers (1) through (6), and tell us, if you can, first whether or not the substance of the classification presented in each of these paragraphs is, first, recognized and practiced in the tire retailing industry, and second, where it comes from—that is, what is its source, if you know, whether it is a matter of marketing theory or academic approach to the problems, and whether the material was by the Standard Industrial Classification Manual, and whether maybe some other source with which you are familiar.

Do you understand what——?

A. I believe so.

Q. All right. And under paragraph (b), which is in the lower part of this left column, it says that: "All sales of tires, tubes, accessories and tire repair services, including retreading and recapping, are recognized as retail in the industry, except those set out in subparagraphs (1) to (6) of this paragraph."

And then subparagraph (1) has to do with sales for resale.

Now, this we have no controversy about in this case. This is wholesale business according to the contentions of both parties.

709 Subparagraph (2), right at the bottom of this left column, concerns sales made pursuant to a formal invitation to bid.

And my first question is: Is that recognized as retail business when done by a tire retailer or dealer?

A. To my knowledge, it is not recognized as a wholesale sale. It would be retail sale, as far as I know.

Q. How does it, as a practical——

A. (Continuing) I don't think it is, because it is currently——

Q. That is my next question. How, as a practical matter, are sales regularly made in the tire industry to governmental units? Who participates in that, and how are they——?

A. Well, all the military business is in the hands of the manufacturer, or practically all of it except retreading, and that is handled directly. The dealer has nothing to do with it, generally.

The state business as far as I know is handled pretty much through the central offices of the tire companies as well. The subordinate divisions of the state, school districts, et cetera, generally, as far as I have seen, are

710 handled in one or two ways, either that the company has their agent to handle—that is, the company—they get the agent; he is handling it, is paid so much on delivery and service. On the other hand, if he sells it, he sells it, and as far as I know it is treated as retail sales.

Q. Now, do the sales to governmental units pursuant to formal invitation to bid—do they have any particular

lassification or any particular significance under this narketing theory that may have been developed by Beckman, Ingle and others, or as you understand it?

A. Normally and generally, let's say as a general classification, I would think yes, you would call those wholesale sales.

Q. According to the theory or academic contention?

A. That is right.

Q. Now, then, paragraph (3), which starts in the upper part of the righthand column on page 33, concerns sales to national accounts in which delivery is made by a local tire company under a centralized pricing arrangement between the customer's national office and the tire manufacturer; payment—according to this manual and set of regulations—payment may be made either to the local dealer or direct to the tire manufacturer.

711

Our concern in this case, Dr. Leigh, is where the payment is made direct to the central office. The billing and what-not in this, the proof is, is done direct to the central office of the tire manufacturer which this defendant represents.

In connection with that kind of transaction, would you tell us what your understanding of it may be, according to the industry's own recognition?

A. Let me be sure I have your question correctly.

Mr. Mitchell: Yes, sir.

A. (Continuing) Presumably bought the tires as such and they are delivered by the dealer?

Mr. Mitchell: That is correct.

A. (Continuing) Now, then, what is the thrust of the question, please?

Q. The question is: How, according to your knowledge, is that kind of delivery transaction considered in the

tire retailing industry? By "considered" I mean classified.

A. There is no distinction there. It is a commission-type arrangement or else a service charge. And as far as I know and as far as I have seen, the accounts that
712 are flowing to me, and we see several of them periodically, there is no separate set-up for this, just taking them in as part of these sales——

Mr. Mitchell: Yes.

A. (Continuing) Are retail sales to me.

Q. And the classification, then, is retail sales?

A. The classification, then, is retail sales.

Q. How, if there is a particular definition or classification for these national account transactions—well, first, I should ask this:

From your knowledge of other industries and your marketing studies of other industries, is this national account kind of transaction known outside the tire business?

A. Oh, sure.

Q. Generally?

A. Sure.

Q. Then perhaps it does have some significance in marketing textbooks or the Industrial Classification Manual.

Could you tell us specifically and briefly?

A. Generally, you would consider it wholesale sales. But even—and I recall one of the Federal Trade Commission cases where discriminatory prices were involved, as I recall, but the question there whether they were through particular organizations making deliveries at one of
713 the stores in such small quantities, whether it became a wholesale or retail sale, as it were.

But generally speaking, they would be wholesale sales.

Q. This is the Industrial Classification Manual, according to the marketing theory?

A. Yes. Getting back, if I may, to the point I tried to make earlier, normally as wholesale business I suspect you would originally get some ingrossing of large quantity.

It was at this level the manufacturers—and also for resale in larger quantities and handling in bulk, and the bulk had to be broken down, maybe carload lots are dealt out for resale, and it was the quantity—the quality and quantity adjusted for the wholesale agents of one type or other to the manufacturer—to the small manufacturers or the processors, or that type.

But it was largely a different type of transaction, not strictly markets of that nature, not characterized by the type of sale that you would make to the individual consumer for household purposes, or your household consumer, and so forth.

So there were these functions. There were varous ones —some six or eight of them that we could mention involved. The movement or procuring in bulk, the
714 financing function, information function, and so on and so forth.

In the more sensitive market, particularly, of where one would think that they would be characterized as wholesale sales.

And so very frequently big industries will buy them nationally for pricing advantage.

Q. One question in that regard, Dr. Leigh. In the tire industry, has the manufacturer taken over this wholesale function, this business of servicing particular big accounts, and that sort of thing?

A. Yes. That is one of the real complaints in the industry on behalf of the dealers, that the manufacturer has done more and more of this business, and as a result,

more of it is handled by the dealer on a service charge or percentage, or on those bases.

Q. Moving on down to number (4), Dr. Leigh, which has to do with sales to fleet accounts at wholesale prices, and then it goes on and defines a fleet account to be a customer operating five or more automobiles or trucks for business purposes—it says, "Wholesale prices for tires tubes, and accessories are prices equivalent to, or
715 less than, those typically charged on sales for resale."

Now, first, is this connotation recognized in the industry on a fleet account that purchases at something less than resale are equivalent to wholesale prices—in other words, does that fit the tire business as you know it?

A. Well, may I raise a question here, please, to be certain that I understand? Actually, sales to fleet accounts, there are no definite recognition of a fleet account.

Q. Dr. Leigh, let's see perhaps if we can simplify this thing in terms of this number (4).

First, the fleet accounts at wholesale prices, without going into what the distinctions and so forth may be, are sales to so-called fleet accounts by tire dealers considered by tire dealers or authorities in the tire industry to be retail business or wholesale business?

A. Retail business. That is the thing I wanted to clarify. That is, the fleet accounts or wholesale prices do not necessarily match up at all.

Mr. Mitchell: Yes.

A. (Continuing) That is one thing. The price structure or situation is so confusing that simply price
716 does not mean a fleet account definition——

Q. Without going into too great detail, the section is in two parts brought into paragraph (4), how to classify sales, and the section goes into whether or not they

are made at below some prevailing price, or whether that is customary.

Has it been your experience and your knowledge of the tire industry that there is a prevailing price that is consistently true in the tire business for any kind of customer?

A. They have been most chaotic for quite a long period of time. There is no—as a matter of fact, there is no tire market as such. There are a series of tire markets, up and down, and the prices vary at times in those markets. But particularly, with these new types of retailers coming in, and that—well, let's say the generality of the use of tires and somewhat standard—I am using "quality", I am using the term loosely—make them susceptible to sale by somewhat new type of outlet. They are sold by drug stores, hardware stores, now discount houses and everything else. And that competition will vary. The cost basis to the retailers makes for a
717 situation that they—and other things—there is just no definite and divided price structure at all. So that the price just does not signify anything in and of itself.

Q. Now, then, the paragraph (5) has to do with sales of a tire rental service on mileage contracts.

First, from your knowledge of the industry, do retailers regularly or only very infrequently engage in such mileage contracts?

A. As far as I know, that is, while the business is increasing somewhat, that is, by retailers or smaller accounts, the mileage business is pretty much like the tire phase—pretty much—the national tire business that has been concentrated pretty much in the hands of the manufacturer over a good number of years, because those tires had to be serviced very carefully to pay out.

Q. To the extent it may be done, however limited, by

a retailer, according to the industry's recognition and practice, if done by a retailer it would be classified wholesale or retail?

A. As far as I know, sir, they are classified as retail. I have to see, you know, the dealer set-up and the whole dealer's actual set-up, whether or not they are such.

Q. Item (6) is "Sales of servicing and repair work
718 performed under a fleet maintenance arrangement on tires for trucks and other automotive vehicles whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price."

Actually, from what you have already testified, that this term "at prevailing retail price" is of course a misnomer and does not have application.

But, if done, is a sale or servicing repair work, if done by a retailer, how would—according to the industry's recognition, be classified as wholesale or retail business?

A. Well, retail.

Mr. Mitchell: I believe that is all.

The Court: Will this be a rather extensive cross-examination?

Mr. Ray: I think we can finish with him in thirty minutes.

The Court: All right.

Mr. Ray: I realize the potential, if Your Honor please, and have intended to be brief about it.

719 **Cross-Examination,**

By Mr. Ray:

Q. Dr. Leigh, my cross-examination will necessarily be short because I don't know a whole lot about this particular subject, and for the most part it will be an effort to clarify what you have said here and what you have said in the past on this particular subject.

First, I want to hand you, if I may, an excerpt——

Mr. Burch: May I see it, Counsellor?

Q. (Continuing) ——from the October 19—I will have him identify it first—let him look at it—October, 1952, issue of the Journal of Marketing published by the American Marketing Association, containing an article entitled "The Quantity Limit Rule and the Rubber Tire Industry," by you.

Do you have a recollection of having written an article about that subject? And if so, does that excerpt appear in that particular article?

A. I wrote an article on that subject. I assume, sir, that this came from that article.

Q. Well, will you look at it and see, if not in your recollection, but your recognition prevails as to what is contained in that particular excerpt, and if so, would
720 you read the part representing what that is?

Will you please read it?

A. Yes.

Q. Well, tell us what it is.

A. (Reading) "Wholesale. The larger the sales volume of a dealer, the larger is the wholesale portion of his business. A dealer in the volume brackets about $100,000 normally sells 20 to 50 percent of his volume at wholesale.

"Commercial——"

Do you want the other?

Mr. Ray: Yes.

A. (Reading) "Commercial sales refer to sales to trucking companies and national accounts. Large dealers to a great extent depend on commercial business for their volume. In urban centers particularly, these dealers concentrate almost entirely on sales to other dealers or to truck accounts and are playing a lesser and lesser part in the over-the-counter sales of passenger tires.

Retail. "Regular retail embraces sales to individual consumers who usually own one or two vehicles."

And there is a reference——

721 Q. So we might be able to see in there, do you—or may I have it, Doctor?

That was written in July, 1952. Is that still valid, Dr. Leigh?

A. Now, are we talking about the distinction here on a theoretical basis, or are you talking about industry practice?

Q. Is there a difference?

A. There is. Are we talking about what is—which is what the article says there? In other words, is it valid for whatever economic purposes, or purposes of industry, now, is it valid?

From the theoretical standpoint, wholesale business—now, let's be sure of what we are saying.

Let me recast, if I may. May I, so we can make myself clear?

Q. Well, yes. Let me say I am going to show you some other writings of yours, and it might save some time if I show you, and let's deal with it in its entirety.

A. Yes, sir.

Q. In the book which you have written, on the subject "Marketing Channels for Manufactured Products,"—you recollect having some writings on this particular——

722 A. That is the Clewett volume?

Mr. Ray: Yes, sir.

A. Yes, sir.

Q. I call your attention particularly to page 122 of that book, which was written, I believe, in 1954, was it not?

A. I believe that is the date, the printing date or copyright date in '54, yes, sir.

Q. You look on page 122 where this particular language is contained, and I will read it so you can follow it.

"The largest volume of sales is made to replace the worn out tires on cars and trucks. This constitutes the renewal or replacement market, which is really a dual market. The largest segment of replacement buyers are individual owners of automobiles and operators of from one to five trucks. These purchasers buy tires as their vehicles need them. Owners of from 5 to 1000 trucks constitute the so-called commercial market. These purchasers buy several to hundreds of tires at a time, and tire costs are a definite item to them. Not only the volume purchased but the discounts allowed and the services required set this group apart from over-the-counter buyers."

723 That is contained in your book?

A. Yes, sir.

Q. And that you participated in writing in 1954?

A. That is right.

Q. Which was published in '54?

A. Yes, sir.

Q. I want to ask a question on that before we go——

The Court: Suppose you put these papers in evidence as you go along, for the Court's benefit, if nothing else, here.

Mr. Ray: Yes, just asked him to identify it.

The Court: Yes, just the part that has been read—have been identified, both of them that have been read as of this time.

Mr. Ray: Well, Plaintiff's Exhibit 13. Let's make them cumulative.

Mr. Mitchell: Cumulative Exhibit 13.

(Thereupon said documents were accordingly marked as Plaintiff's Cumulative Exhibit 13, and same will be found among the exhibits in the cause.)

Q. Now, Dr. Leigh, I ask you to have the book in your

hand and turn to the bottom of page 131 that is
724 marked in the book there, in that particular part of the book and the subject or chapter which you wrote here was "Automotive Tires." I believe that is the title of the chapter——

A. That is right.

Q. (Continuing) ——in which this is contained.

A. Yes, sir.

Q. And you point out in that that "Gasoline service stations, part and accessory dealers, motor vehicle dealers, automotive repair shops, farm equipment dealers, department stores, chain stores and mail order houses have all gone into the retail tire distribution business, and that as a result of this, the tire dealer has gone heavily into selling to commercial accounts and to all these types of retail dealers."

That is the quotation I just gave you. Then you conclude in there, in that general area there that:

"Thus he is no longer primarily in the retail business. But, he is still being referred to as a retail dealer."

Now, this would be a specific quotation. I am coming to primarily the part I am particularly interested in, the part there, starting at the bottom of page 131:

725 "The character of tire dealers has altered as they adapted themselves to the new competition and to changing market demands. These dealers have become primarily semi-wholesalers, truck tire sellers, and recappers instead of passenger tire retailers. The dispersion of the tire market plus the fact that a little retailer or gasoline station needs to carry only five passenger tire sizes to top 87 percent of the passenger car market has encouraged the multiplication of tire outlets. Tire manufacturers have encouraged tire dealers by their discount programs, to carry tire stocks and sell and supply these small sub-dealers. On the

other hand, the drift of passenger tire purchasing from downtown stores to outlying convenient locations has caused the large, more centrally located dealers to concentrate on the large-volume commercial account business, recapping and other tire services."

Now, as far as I know, those are the only excerpts from your book that seem to be particularly pertinent here, or at least, those were the excerpts you read.

And I think probably the short one—in fact, we will put this paper, of course in the record. I wish
726 also to make it Exhibit 13.

(Thereupon said document was accordingly marked as a part of Plaintiff's Cumulative Exhibit 13, and same will be found among the exhibits in the cause.)

Q. As quoted, your writings recognize a category of sales you term "commercial sales," is that correct?

A. Yes, sir.

Q. You have also been careful, I have noted, in bringing attention to your previous testimony, to draw the inference as to industry recognition, practice in the industry.

I might point out to you—and I think counsel may agree with my interpretation, or may not—but that Congressional Record refers to that recognition in the industry as not being recognition by the industry—is what the industry itself says.

But with that statement, and since you have indicated you are dealing with either black or white—that is, wholesale or retail—I now ask you if there is there recognized at least a gray area between what is wholesale and retail, whether it may properly be termed non-retail?

A. I would not classify it as non-retail, because by
727 that approach it seems to me they are non-wholesale.

Because one of the definitions of that—I dislike to use that term, it is non-descriptive——

Q. Let me——

A. (Continuing) There is a gray area there, that is correct, but it is for the Congress to classify or characterize such.

Q. Let me put it this way to you, if I may.

A. Yes, sir.

Q. If I buy some large tires through you on a volume business in excess of nine hundred thousand dollars, one hundred tires for a large piece of equipment that I operate, and Mr. Mitchell, counsel for the defendant here, buys four tires for his dilapidated '54 Ford——

Mr. Mitchell: Let me state here it is a '53 Chevrolet.

Q. (Continuing) I get a substantially reduced price for the one hundred units that I buy from what he does, from the so-called list price or retail price.

Is his transaction in which he goes in and buys a tire from the dealer—is this a retail transaction?

A. I can't answer you on that basis, sir, for this reason——

728 Q. I haven't gotten into the one hundred units yet.

I am talking about he buys four tires for his own—tires at list price for his own tires?

A. He is most foolish if he does. He should go to the next store and see what he can get there.

Q. Don't mean he doesn't haggle with them. But that is a type of retail transaction, is it not?

A. Yes. And on the other hand, while here several years ago perhaps on a thousand units, and with that account will be a true transaction—rather, may be a commercial account, today I think it is becoming relatively rare, that they are keeping down inventory and pulling out groups, then pick up, one, two, three, four. And as a matter of fact, the great, great bulk of the true transactions are in the small accounts, because they are small buyers.

But even the big buyers are keeping their inventory down to such an extent that they are not buying in one hundred units very, very frequently any more, as I sense the situation.

Q. Well, it is plain there is a differential between volume purchases at a lower price and in the ordinary purchase that I refer to that Mr. Mitchell has, for that
729 matter, is there not?

A. One would expect it, and there should be, yes, sir.

The wholesale would expect it. There is that volume type of situation. You would expect it.

And my point was—the point there that in this industry the price is not the characteristic that you saw, whether or not you are, say, at five tens, or six tens, or nine tens,—is common because of volume business, whatever it is, and what the market is.

Q. And your practical experience is, as you have written, from some of the excerpts I have read there, there is a clear recognition of the discount for volume in the tire industry, is there not?

A. There has always been. And even in the gasoline service station and in that way that that is done, yes, sir.

Mr. Ray: Yes, sir.

A. (Continuing) And that is a very small volume.

Q. And the quantity purchased—it would just be unbusinesslike for a dealer not to try to sell quantity purchases at lower prices, would it not?

A. He surely can do it, yes, sir.

Q. And the tire industry is no exception to trying
730 to do business as one wants to from that standpoint, at least, on your tire dealers,—don't mean the tire industry—tire dealers?

A. The only thing I would say in that connection, I

believe that the tire industry has emphasized the quantity factor, number of units purchased, or the dollar volume purchased, more than has the industry in general. This industry would have used wholesale classification or retail classification, it has been my experience generally, more than has the tire industry.

Q. Now, in your testimony that, as I understand the situation, the statement—and I believe it is also in effect what is in the book there—that not all commercial sales are wholesale?

A. I made that statement of my own initiative, yes.

Q. Does that infer that there are situations under which a commercial sale for business purposes would not be regarded as retail? In other words, making it easy for you to answer, I will say that you are going to have to draw a distinction between commercial, are you not?

A. Now, I am speaking theoretically again, not necessarily the practice in the industry. Yes, my own thinking, some of those sales in very small quantities would—they are more characterized by the retail than by the wholesale.

731 Q. Yes. But the question was phrased just the other way, Dr. Leigh. What type of sales are non-retail, or at least, do not fit into the retail category where they are sold—where they are commercial sales for business purposes you have indicated——?

A. Well,——

Q. ——That one of the situations where you could not characterize this as a retail sale?

A. Yes, I would——

Q. Was the theory——?

A. I would generally state theoretically any sales to a substantial, large truck company should be classified theoretically as wholesale sales, if I am answering the question intelligently.

Q. Well, now, that is part of it. Is there any line that you would draw, if you had to draw a line, as to the substantial, large trucking accounts? Can you tell us whether it is five or ten?

A. In competitive programs I believe, for general purposes, perhaps, owning ten trucks and above, or five trucks and above. The five, as being discussed some in the industry—I don't know whether we have that. I don't think there is any set decision on it. I know the dealers have been attempting to get some definition there
732 that the manufacturers there would not step in and sell in the category of truckers below certain sizes, and so forth.

But certainly, I think that you could not call wholesale much below five vehicles, certainly on a theoretical basis, I would think.

Q. Now, let's get away from theoretical to practical.

A tire dealer has to separate his sales into retail sales and into fleet account sales and other categories.

Is it or is it not a practical approach for him to have a definite dividing line between what is considered to be a fleet or commercial account and what would be considered to be strictly a retail transaction?

In other words, is there some technical limitation—limit of the number of vehicles the test which as a practical matter would be useful to a tire dealer if he is faced with the alternative?

A. Well, I would think if I were a tire dealer, I certainly, if I were, would want to look at some such classification. But generally, from what I have seen, they do not do so adequately at all, because I think the cost differentials and the price differentials might be worthy of classifying so one could see what they were—whether

this businessman adequately interprets, or whether
733 the other one did. But generally, the tire dealers haven't done so. That is my own——

Mr. Ray: I believe that is all at this time, if Your Honor please.

Thank you.

**Redirect Examination,**

By Mr. Mitchell:

Q. Dr. Leigh, on cross-examination you were asked about certain writings that you have that used the term "commercial account" or "commercial market", and you were asked as to—what those references are and how it was used.

My first question is, when you were writing articles for the journals that have been cited here and for textbooks for which you interpreted, were you writing as one—one considered an instructor or professor in marketing, the head of a department, the Dean of the graduate school, or were you writing as a member of the tire retailing business?

A. I wasn't certainly telling, in those journals or in those chapters, the retailers what they should do, but rather, of course, trying to draw some distinctions from
734 the theoretical standpoint what good—the application of good theory to the situation would determine, and, of course, using classifications that I felt were adequate and sound under the circumstances.

Q. Yes, sir. But they express the theoretical or market research character, the marketing teacher's attitudes and classifications, do they not?

A. Yes. But in the long run, they might be good practice, too. I would say that. But not necessarily would be. I felt that it was sound or I would not put it out, of course.

Q. Every teacher would like to see his theory given practice, and I know you are a good teacher and no exception.

Now, Dr. Leigh, in the practices and recognition by the tire dealers and in the tire industry, in that particular industry how is this so-called commercial transaction or commercial sale treated, as a wholesale sale or treated as a retail sale?

A. It is treated as a retail sale. That I know in my work that I have done recently I had an awful time
735 getting any information—certain information on wholesale sales where we were trying to split that which was for wholesale purposes or resale purposes—strictly at regular—I am just trying to make a distinction here—really, over-the-counter or through the regular so-called dealer channels. And I have had an awful time getting that information because it is—which the industry does not draw adequately.

Q. All right. In the tire retail industry the recognition is simply between wholesale business, which is for resale, and/or consumer sales, which are retail; is that correct?

A. Well, that is pretty generally so, yes, sir. That is so.

Q. Now, you indicated the consumer in the tire industry—tire retail industry—does practice and employ this idea of discounts for quantity purchases, as is typically true, I am sure, in all business.

My question is: Does the fact that the tire or product which the tire dealer may have sold at a discount in quantity alter the fact it is a retail sale if it goes to the consumer?

736 A. Not as far as our practice of accounting and discussion, sir.

Mr. Mitchell: Yes, sir. And that is the whole point of my question. I am trying to develop what you know of

to be the recognition in the tire industry—tire retailing industry.

Thank you, Doctor.

**Recross-Examination,**

By Mr. Ray:

Q. One further question, if I may.

When you referred to consumers, are you talking about the ultimate consumer? Is that the man who uses it—your definition of "consumer", or are you using "consumer" in the broader sense?

A. Again, when I am talking theory—when I am talking marketing theory normally we think of the consumer as the ultimate consumer, the so-called household consumer. You and I are of course under the general category in that situation.

And now I am generalizing again.

Commercial sale there would be—industrial sale, or industrial or commercial sale would be lumped into
737 wholesale, generally speaking.

So, ultimate consumer sale is generally retail, theoretically, and the other is more wholesale.

Q. Now, I neglected to read one of the footnotes in this item I read from page 132 of your book.

You don't have a copy, Doctor, but I will read it. It might help a little.

Footnote 59, on page 132 of the Marketing—book Marketing Channels——

A. Yes.

Q. "National Association of Tire Dealers surveys show that as tire dealers become larger their proportion of wholesale and commercial volume grows larger."

A. That is I would say generally true. That has been my experience.

Q. Now, in order to clear up, I believe, an ambiguous, I believe, impression counsel has left that anything except just wholesale are retail, as far as the classification of business in sales is concerned, is all there is.

Can you tell us now whether there is a clear and well recognized area of business sales among tire dealers that is referred to generally and generically as commercial accounts or commercial sales?

738 A. Well, they would talk about commercial——

Q. I am not talking about theory now. I am now talking from a practical—you said it was theoretical.

A. Yes, they would talk about commercial sales and commercial accounts, but——

Q. And they also talk about retail sales?

Mr. Burch: I am sorry to interrupt. He said "but——"

Q. Beg your pardon. You finished, didn't you?

A. They would talk about commercial accounts. They would talk for advantages for their trucking accounts or fleet accounts, and so forth, call them commercial sales, terms that have been used in the industry, but no segregation of those sales, and in the same breath treat them as retail.

Q. And, sir——

A. (Continuing) That is no——

Q. Do sales tax statutes have any bearing on the fact that they found it not necessary to segregate and did not actually segregate on their records, perhaps in some instances, commercial sales from other type sales?

A. I believe that would pre-date——

Q. In other words, it is fair to say——

739 A. (Continuing) They just——

Q. Further, that the people in the United States Department of Labor or elsewhere in the Government itself may have used some terminology bases of retail or

wholesale, or are just simply pulling something out of the air? At least, there is one recognized area of classifications of sales in the tire industry, a such, as commercial, is there not?

A. The classification as between wholesale and retail, as applied to tire dealers, does not draw a line as to the commercial sales, that is, does not segregate commercial sales and throw in the wholesale, as far as I have been able to determine. It throws all those in retail and has classified them as retail sales. The wholesale sales were for resale purposes pretty generally, as a means of classification of tire accounts—in other words, the wholesale business was one that was doing fifty percent or more of its volume in wholesale.

Q. Well, what I meant, this is not—it is not a theoretical thing, then, talking about a commercial sale?

A. No, there is a distinction in the account, no doubt on that score.

Mr. Ray: That is all.

Mr. Mitchell: No questions.

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VOL. II.

746 **DEPOSITION OF TED CURRY.**

* * * * * * *

748 **TED CURRY,**

of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed and testified as follows:

**Direct Examination,**

By Mr. Mitchell:

"Q. Would you state your name, please, sir?

"A. Ted Curry.

"Q. And your home address?

"A. 502 Tresid, Apartment 1, Akron 13, Ohio.

"Q. By whom are you employed, sir?

"A. B. F. Goodrich Company.

"Q. For how long have you been employed by that company?

"A. In excess of 20 years.

"Q. What is your present title or position?

"A. Controller of Retail Stores.

"Q. And what is your office address?

"A. 500 South Main.

"Q. In what city, sir?

"A. Akron, Ohio.

"Q. Is that the home office of your employer company?

"A. It is.

749 "Q. Now, then, Mr. Curry, would you outline, please, sir, what positions you have held and what generally the duties and responsibilities of each position are in your course of about 20 years' employment by B. F. Goodrich Company?

"A. The first position held was that of budget man. In that capacity, I did sales work, collection work, and some accounting.

"Q. And where were you working at that time?

"A. That was in San Antonio, Texas.

"Q. For about how long did you hold that position?

"A. In excess of a year.

"Q. And from there where did you move?

"A. The next assignment was in Harlington, Texas, as a credit and operating manager. The credit and operating job was largely accounting and collections, credit work, some sales work.

"Q. Were both of these first two positions in connection with a retail store operation?

"A. Yes, both retail stores.

"Q. Of the B. F. Goodrich Company?

"A. Yes, the first store was located in San Antonio
750 at Lexington and Euclid Avenue. It does not exist in that location any more.

The second store was on Jackson Street and Harlington.

"Q. And what was your third position with the company?

"A. I was service manager in our Corpus Christi, Texas, store. In that particular assignment, I had charge of the services that were rendered in the store which included the installation of our products to the customers' cars, primarily.

"Q. For about how long did you hold that position?

"A. That was about six months, as I recall it.

"Q. And do you recall what your next position was?

"A. Yes, I was store manager at Port Arthur, Texas. As store manager, I had charge under the supervision of our district personnel of all of the functions of that store, which included its sales activities, its accounting activities, credit activities, and service activities.

"Q. And after that, where did you move?

"A. I was then assigned to the Beaumont, Texas, store as store manager with like duties.

"Q. For how long did you continue in the role of store manager at one or another of the stores?

751 "A. In the Port Arthur store as I recall now, it was about a year.

In the Beaumont store, about 15 or 16 months. I don't recall exactly.

"Q. And what was your next position?

"A. I was store manager at our Austin, Texas, store, like duties.

"Q. How long were you there, please?

"A. Four years.

"Q. Thereafter, what was your position?

"A. I was store supervisor in our Houston, Texas, District which included stores along the Gulf Coast area, stretching from Lufkin, Texas, to Brownsville, Texas, at a point about a third in from the state. It covered variously from six to eleven stores.

"Q. And was this your first advancement to a district level with your company?

"A. Yes.

"Q. And I take it from the job title that you had to do with the merchandising in the stores that you managed?

"A. That is right.

"Q. Thereafter what position did you hold?

752 "A. I became manager of retail operations for one-half of the Southwestern Zone, headquartering in Kansas City, and having the stores in the—what was then known as St. Louis, Kansas City, and Omaha Districts. That job was later expanded, some two years later, to cover the Western Region as it became designated then, covering about a fifth of the country.

"Q. For how long did you hold that position, sir?

"A. The total of the two tenures as manager of retail operations was six and a half years.

"Q. And thereafter, what position did you hold?

"A. I came to Akron to become controller of retail stores.

"Q. Will you give us the approximate date of that?

"A. I came here on August 7.

"Q. What year?

"A. Of this year.

"Q. So that during the course of more than 20 years' employment by B. F. Goodrich and Company, you have been directly—your positions have all been directly related to the managerial or accounting end of the retail store operations of your employer?

753 "A. That is correct.

"Q. And over the course of time, you have advanced from one position to another, and ever since you came to the district level you have been responsible for an increasingly large area?

"A. That is correct.

"Q. And I take it since your advancement to the home office and your present title, you are concerned actually with all stores in the United States?

"A. That is correct.

"Q. Operated by the B. F. Goodrich Company?

"A. Correct.

"Q. Now, Mr. Curry, the lawsuit in which your deposition is being taken concerns a store which is in the tire business as a retail store, located in Memphis, Tennessee, and makes sales to customers in that community. I realize that in connection with the tire manufacturing, your employer, B. F. Goodrich and Company, you might also have some information or knowledge about sales in the international market of tires, or sales to manu-

facturers of automobiles, and I want you to under-
754 stand that my questions and the frame of reference of my questions today will be excluding such foreign sales or sales to manufacturers and will pertain to sales by a store that sells to customers in its community.

With that background, would you please state, sir, what is the classification of sales by such a store to customers in its community of tires, tubes, and other rubber products—how are such sales categorized or classified?

"A. There are two classifications. Tires that are sold for resale are called dealer or wholesale sales. Tires that are sold to be used by the purchaser are retail.

"Q. And am I correct in thinking that some organizations attach the term consumer sales to these tires that are sold to be used that are purchased?

"A. Right.

"Q. Are there several different categories or types of sales that are included within the consumer or retail sale classification?

"A. Yes, there are two. The retail sale of the one customer who comes into your place and purchases and such sales that we know as commercial sales which are a
755 subheading or a part of retail sales. Those are the accounts that have multiple vehicles and who justify or warrant regular solicitation and regular calls.

"Q. In determining whether a sale shall be classified as a retail or consumer sale, or whether it should be classified as a sale for resale, does the use to which the product is to be put enter into it, or does the quantity to be purchased enter into it, or does the frequency of the sale by a given purchaser enter into it, or does the character of business that the purchaser may be engaged in enter into it?

"A. Will you restate your question?

"Q. Yes. In classifying sales by a retail store or a tire store that sells to purchasers in its community, is there a differentiation—correction, strike that.

Would a sale be classified as a retail or consumer sale regardless of the character of the purchaser, or the frequency of the purchase by that purchaser, or the quantity of tires purchased by that purchaser so long as the purchaser is the consumer of the product?

"A. It would.

756 "Q. And would that in any of those events be classified as a retail or consumer sale?

I can see by the puzzled look on your face I have not clearly stated it.

"A. Please restate it.

"Q. I am trying to determine, Mr. Curry, if there are two types of sales as you may have said, and that one of them are sales for resale and all others are sales to the consumer and are classified as retail sales?

"A. That is right.

"Q. Is this definition and classification which you have given us based upon your experience over a period of many years with the employer B. F. Goodrich Company in the several positions that you have held?

"A. Yes.

"Q. From your activities in those positions, can you state whether or not that same basic definition or classification of sales is observed by other components of the tire industry?

"A. You are referring now to competitors?

"Q. Yes.

"A. It would be hearsay, but to my knowledge, yes.

757 "Q. Do the records and accounting procedures and what-not of your company reflect this same basic two-part classification of sales that you have just outlined?

"A. Yes, sir.

"Q. At my request, have you brought some of those records in with you today?

"A. Yes, sir, I have.

(The said document was marked as Deposition Exhibit No. 1, Witness Curry, by the Notary.)

By Mr. Mitchell:

"Q. Mr. Curry, I have asked the reporter to mark as an exhibit which has 'Bi-Daily Sales Analysis and Costing Summary' and which has other information printed on it. It appears to be a B. F. Goodrich store form. Would you tell us briefly and generally what use is made of this particular accounting sheet and how information is entered on it?

"A. Yes, sir. This is commonly known as a spread sheet where we break out the sales by classification, departments, and by channel of trade.

In our stores, each sale is covered with a sales ticket and that sales ticket is then broken out into this sheet. If you will notice at the extreme left hand corner, as an example, passenger tires. Passenger tire would be classified, if it was retail, under the retail column, with the extreme left hand column being sales and the column next to it as the cost of that sale. That has reference with the cost of the merchandise.

758

If it is a commercial sale which is the next classification down which is a part of retail, we know or recognize the commercial account as one who has a fleet of trucks. We would recognize him by his name and by our listing and enter it to that particular section of the report.

If it is a dealer, someone who is engaged in the business of buying tires for resale, we would enter that sale into the bottom column and so account for it.

"Q. Now, then, you have indicated that on this sheet, the lower third area of it is devoted to that which is titled commercial, and you have indicated that that is a

subdivision of your retail or consumer sale category. Would you explain, sir, what the purpose of segregating that part of the retail sales may have been from your company's viewpoint?

759 "A. Yes, sir. There are two reasons. We wanted to know, first, what portion of our business was the people who come in casually to buy from us, and what portion or what percentage was representing in the trucking accounts in the area to whom we have regular solicitation.

"Q. Now, then, at what point or at what location is the information spread on this spread sheet made Exhibit 1 to your deposition?

"A. Repeat?

"Q. Yes, sir. At what point in the merchandising channel, that is, at the retail store itself or some district——

"A. This is performed at the retail store.

"Q. At the retail store?

"A. Yes.

"Q. And are there instructions that go out to bookkeepers or clerks or others who perform this function?

"A. Yes.

"Q. In the retail stores?

"A. Yes, sir, there are instructions.

"Q. And do those instructions coincide with this classification of sales?

"A. Yes.

760 "Q. Into two broad categories?

"A. Yes, sir, they do.

"Q. Of which you have already testified?

"A. Yes.

"Q. I take it pursuant to those instructions a bookkeeper or clerk fills out the spread sheet which you have made Exhibit 1?

"A. That is right.

"Q. Now, sir, also at my request you have brought in another type of accounting record which I will ask the Court Reporter to mark Exhibit 2 for the deposition.

(The said document was marked as Deposition Exhibit No. 2, Witness Curry, by the Notary.)

By Mr. Mitchell:

"Q. Now, please, Mr. Curry, would you tell us generally what the purpose and function of this Exhibit 2 may be, sir?

"A. Yes, sir. This is a recap sheet from which we take the information that is developed in the first form and transfer into a consolidated form here. It also has place or room for a cash recap, if you will notice in the middle of the sheet, and to the right hand of the sheet is certain data that we need or use at the end of the month relating to units.

761 This sheet is then mailed to our home office every other day, is prepared every other day and mailed into our home office, and from this sheet an operating statement is developed for that particular store.

"Q. And at what point is this Exhibit No. 2 prepared?

"A. This is prepared in the field, at the store, the same place this is prepared.

"Q. And, of course, when you indicate 'this' you are referring to Exhibit 1?

"A. Right.

"Q. Does this Exhibit 2 carry out the same basic allocation or classification of sales in accordance with the definition you have stated?

"A. Yes, sir.

"Q. Also at my request you have brought in another set of accounting records which I will ask the reporter to mark as Exhibit 3.

(The said document was marked as Deposition Exhibit No. 3, Witness Curry, by the Notary.)

By Mr. Mitchell:

"Q. I will ask you, Mr. Curry, what this accounting sheet now marked Exhibit 3 to your deposition may
762 be, and how it is used?

"A. This is a retail store operating statement. The information that is developed from Form 1, consolidated on Form 2, is then transposed to this sheet in our Akron offices. Together with that information, certain other information which comes to us by different routes such as our expense spread is entered to this sheet.

"Q. And where is the information compiled and entered on your Exhibit 3?

"A. In Akron.

"Q. And it is a compilation or an accumulation, as I take it from your testimony, of information that had appeared on Exhibit 2 and likewise——

"A. That is correct.

"Q. ——originally on Exhibit 1?

"A. That is correct.

"Q. Now, then, it is obvious by inspection, but does this same classification of sales into the two basic categories that you have described, is that followed through on your Exhibit 3?

"A. Yes, it is.

"Q. I notice that here on your Exhibit 3 there is in
763 the upper part of it a further classification 'DFB', and I would like for you to explain, if you would, please, sir, what those initials refer to?

"A. That is direct factory billing, sometimes known as fleet national accounts. Those are accounts that are negotiated and sold by a home office staff. The merchandise and service is delivered at a store, but the actual billing is rendered by the home office group.

There is no billing prepared in the store other than a transfer. The actual billing to the customer occurs at the home office.

"Q. And these national accounts who are entitled and who arrange or contract with your home office personnel to purchase under a plan of this sort, are they listed by your company and recognized by all of the dealers or stores that you may have throughout the United States?

"A. Yes, sir, they are listed in bulletin form and known to stores and dealers.

"Q. And you have indicated that the sales agreement, the solicitation, the offering, and the consummation of an agreement is conducted between the home office of
764 your employer and the appropriate representative of these national accounts. What is the function, then, of the local retailer or local store in connection with this kind of business?

"A. The local store is a delivering and servicing agent.

"Q. And is it compensated for that service?

"A. Yes, it is. That store is compensated on a percentage basis for the service rendered.

"Q. From your company's viewpoint, is this DFB transaction considered a sale at the local retail store level?

"A. No, sir, it is not.

"Q. In the course of accounting and of keeping the records with regard to the retail store or dealers of Goodrich products, are these DFB transactions pulled out when quantity discounts or certain other functions, certain other computations are made?

"A. Would you restate your question?

"Q. Yes, sir. You have indicated that the DFB transactions are not considered as sales made by the local retailer or store, and I see here that they are included in a store operating statement which, if I understand your Exhibit 3 corresponds roughly to what may be
765 known as a profit and loss statement. My question is: If in computing the amount of sales by a

retail store or dealer or computing any quantity discount that that store or dealer may be entitled to or in any other connection, are these DFB transactions adjusted as excluded?

"A. They are excluded for that purpose, yes, sir.

"Q. And that exclusion from the sales total is consistent with what you have just said about not considering them sales made by the stores?

"A. That is right.

"Q. But merely a delivery function?

"A. That is right.

"Q. Now, then, Mr. Curry, do the Exhibits 1, 2, and 3 to your deposition reflect the whole process of accounting for sales by a dealer or at a retail store of the Goodrich Company up to the point where information from your Exhibit 3 would be accumulated with information from many similar accounting statements for presentation on the composite P and L statement of your employer?

"A. Yes.

"Q. And throughout it is apparent, but for the record, your company's records do maintain this consistent
766 classification system as regards sales?

"A. Yes, sir.

"Q. Now, then, at my request, have you brought in also instructions that go out to store managers or appropriate officials in store operation by your employer concerning lease terms or lease agreements which will be made for space occupied and used by your stores?

"A. Yes, sir.

"Q. From your experience and participation at several levels up through the management of stores for your employer, are you generally familiar with the fact that when the space is leased, the rent to be paid by your company for the space in some instances is related to the gross sales or some aspect of sales made through the location?

"A. Yes, sir.

"Q. And have you brought in what appears to be instructions concerning how the terms and provisions of such leases will be drawn?

"A. Yes, sir, I have.

Mr. Mitchell: I ask that they be made Exhibit 4 to your deposition.

(The said document was marked as Deposition Exhibit No. 4, Witness Curry, by the Notary.)

767 By Mr. Mitchell:

"Q. Now, then, if you would, please, Mr. Curry, turn to the appropriate place in your Exhibit 4 at which such terms as 'retail sales' or 'net retail sales' are defined and mark in the margin where those definitions or provisions occur in this Exhibit 4?

"A. It occurs at the fourth and fifth paragraphs beginning on Page 2 and ending on Page 3.

"Q. And do I interpret this correctly, that is your Exhibit 4, to be instructions that go out from the home office of the B. F. Goodrich Company to a store manager or someone else who is authorized to enter into a lease agreement and to contain your employer's choice of provisions that will be included in leases for store space?

"A. Yes, sir, that is correct.

"Q. And the parts that you have marked are the provisions that your employer, as one party to such lease agreements, seeks to insist to have in these lease agreements?

"A. That is correct.

"Q. It is obvious on inspection, but for the record, Mr. Curry, will you state—after whatever rereading of these provisions you may wish—do they coincide

768 with and do they consistently present this same basic classification and definition with regard to sales by stores or dealers that you have already testified to?

"A. Yes, sir, they do.

"Q. One further document, Mr. Curry. I hand you a bound pamphlet which appears to be copies of documents and records taken from your employer's files or such records headed on its cover sheet 'B. F. Goodrich Exhibits and Related Notes in re Memorandum on What "Is Recognized as Retail Sales" in the Tire Industry' and the date of which is July, 1954, appearing on the cover sheet.

I ask you if you can identify that, sir, as having come from your company's records and consisting of accounting data, directions to store personnel, or other items from your employer's files?

"A. Yes, I do identify this as excerpts from our records.

"Q. And does it appear to have been compiled as reflected on the face in July, 1954?

"A. Yes, sir, it does.

"Q. Do you know from whatever source or use that have been made of that pamphlet or that exhibit?

"A. Only by hearsay.

769 "Q. What is that, according to your information?

"A. That is a definition of retail sales.

"Q. And would you have that marked as Exhibit 5, to your deposition, please?

(The said document was marked as Deposition Exhibit No. 5, Witness Curry, by the Notary.)

By Mr. Mitchell:

"Q. Mr. Curry, in the course of your deposition, you have used one or two terms that I would like to inquire about. One of them was 'fleet account sales'. Are those classified as consumer sales or sales for resale by your record?

"A. They are classified as consumer sales.

"Q. And would you tell us briefly and generally what does the term 'fleet sales' mean? How is it derived?

"A. Fleet sales consist of those companies or individuals in any given market that have pieces of equipment, and who have enough volume to justify regular solicitation, whose purchases are great enough that they justify regular calls.

"Q. Are the prices at which Goodrich products,
770 and specifically tires and tubes, will be sold by dealers or by Goodrich stores to such fleet accounts rigidly fixed or stabilized in any way by your employer?

"A. No, sir, they are not. The entire industry, competition forces the prices.

"Q. I think it would be certain that much freedom would have to be given to your independent dealers who handle Goodrich products in connection with these fleet sales, and fleet attempts. Is considerable latitude also given to your managers and others in your own company's retail stores?

"A. Yes.

"Q. With regard to such sales?

"A. Yes, sir, it is.

"Q. And again, I take it that it is a matter of competitive forces at a particular time and place?

"A. That is correct.

"Q. Which dictate how the price is set?

"A. That is right

Mr. Mitchell: I believe that is all.

**Cross-Examination,**

By Mr. Tincher:

"Q. Mr. Curry, am I correct in assuming that these
771 forms which have been made Exhibits 1, 2, and 3 to your testimony are used only by your company in the operation of its company-owned stores?

"A. Yes, sir.

"Q. And the instructions set out in Exhibit No. 4

relate to these leases of premises for company-owned stores?

"A. That is correct, sir.

"Q. Then, your testimony has not related to franchised dealers?

"A. No, sir.

"Q. How many company-owned stores does the B. F. Goodrich Company have in the United States?

"A. Under the name B. F. Goodrich, 445.

"Q. Does it operate other company-owned stores under another name?

"A. There is an arrangement and I am not too familiar with it, in its operation of leased departments. They are departments that operate in conjunction with several department stores.

"Q. That was four hundred and how many?

"A. Four hundred and forty-five.

"Q. Do any of those 445 company-owned stores
772 under the name of B. F. Goodrich sell more than 25 per cent of their gross business for resale?

"A. I will have to answer that question on the basis of not having complete information. Some of them do, and they are so recorded where they do.

"Q. In other words, you do have some B. F. Goodrich stores, then, 25 per cent or more of whose business is sold for resale?

"A. Yes, sir, there are some. How many, I don't know.

"Q. Now, Mr. Mitchell's questions and your answers related to retail stores. Would you include in that term retail stores those stores you have just described as doing more than 25 per cent——

"A. Yes, sir, that is included in the total.

"Q. Are any of those stores which would do as much as 50 per cent of their business sales for resale?

"A. I cannot answer that question. I do not have that information with me.

"Q. But if it is between 25 per cent and 50 per cent, you would still include the store as a retail store?

"A. Yes.

"Q. Do you know whether any of those stores
773 might exceed 50 per cent of their sales?

"A. No, sir, I do not have that information.

"Q. Does B. F. Goodrich Company have tire distributors who are known in the trade as franchise dealers?

"A. Yes, sir.

"Q. Would you be able to say approximately how many such dealers the company has in the United States?

"A. No, sir, I can't. I am not in that division of the company, and I hear figures but I don't know whether they are right or not. I would not want to put them in the record.

"Q. Would you know whether it is more or less?

"A. There are more than there are company operations.

"Q. Would you think it is twice as many more?

"A. I would say there are more than twice as many more.

"Q. Now, Mr. Curry, would you know whether any of those franchise dealers derive more than 25 per cent of their gross revenue from sales of tires and tubes for resale?

"A. I do not have those figures.

"Q. From your knowledge of the company's distribution system, would you express an opinion as to whether there are some such franchised dealers?

774 "A. From knowledge of the business, I would say there is, yes, sir.

"Q. And would you classify such dealers whose sales for resale constitute more than 25 per cent of their gross revenue as retail establishments?

"A. Would you restate that question, please, sir?

Mr. Tincher: Will you read the question, please?

(Question read.)

The Witness: That is an extremely hard question for me to answer. I have nothing to do with the wholesale part of our business. I would think that some of those dealers would be so classified as retail.

By Mr. Tincher:

"Q. You are basing that answer on the same consideration——

"A. On the same premise that I do for our stores.

"Q. Yes. In your treatment of your merchandising, do you have any percentage point at which you break off to distinguish an establishment as being either wholesale or retail in your industry?

"A. No, sir, not to my knowledge.

"Q. Do the B. F. Goodrich Company's franchised dealers supply tires and tubes to the company's fleet
775 national accounts in the same manner that the company-owned stores do?

"A. That program is available to them and generally they do. They participate in that program.

"Q. When a franchised dealer delivers to one of the fleet national accounts a number of truck tires, for example, does the dealer bill that national account for the sale?

"A. I am not familiar with all of the mechanics of that transaction. It is my understanding that he bills the tires back to the company and the company then bills the national account.

"Q. You don't know of any exception to that practice?

"A. No, sir, I do not.

"Q. Now, would you explain the basis on which a franchised dealer who bought tires from the B. F. Goodrich Company would deliver them to, for example, the Coca Cola Company, and then bill the transaction back to B. F. Goodrich Company?

"A. Would you read——

Mr. Mitchell: We would object to that question, unless you would tell us how you are classifying the Coca Cola Company, in what category of purchase your
776 question assumes that.

By Mr. Tincher:

"Q. That was a fleet national account, assuming that Coca Cola would be one of the B. F. Goodrich Company's accounts.

Mr. Mitchell: I have no idea the intricacies of those. I think at random, the Coca Cola Company might have a distinguishable arrangements with B. F. Goodrich, some arrangement distinguishing it from other national accounts. If so, I think the witness ought to explain that to clarify the context of his answer.

(Question read.)

The Witness: I do not know the answer to that question. In my 20-odd years, I have never been in the wholesale division, neither have I followed the mechanical procedure of billing through.

By Mr. Tincher:

"Q. Do you know whether the fleet account sales of B. F. Goodrich are all handled under the wholesale division of the company?

"A. You are referring to fleet national accounts, as
777 we call them, DFB.

"Q. That is right.

"A. May I qualify the question?

"Q. As much as you like.

"A. We are operating two divisions. I say this to make perfectly clear. The retail group with which I am associated and a dealer sales group. The dealer sales group handles—their dealers handle some of the fleet national accounts, stores handle some of them.

"Q. Are there two different classifications, then, of your fleet national accounts?

"A. No, sir, they are all the same classification.

"Q. Well, when those sales are made through the company-owned stores over which you have control, as I understand it, are they considered retail sales or wholesale sales?

"A. They are not considered sales at all so far as the store is concerned. The store is a delivering agent and those sales are billed by the fleet national accounts group.

"Q. How are they considered by B. F. Goodrich Company, without reference to the company-owned stores?

"A. I can't answer that as to how it goes into the corporate statement.

778 "Q. And do you know whether it is handled in the same way for the dealer sales group that it is handled for your group which is the work of the company-owned stores?

"A. It is my opinion that it is.

"Q. Mr. Curry, you identified your Exhibit No. 5 as containing material relating to a definition of retail sales which you understood through hearsay only. Could you tell me whose definition that was that you had by hearsay?

"A. In this?

"Q. Yes.

"A. It is my understanding that this was prepared by the management of our company. I say that because I recognize these pieces that are in here as coming from company publications.

"Q. Are you in a position to pass upon whether the definition of retail sales as contained in Exhibit No. 5 is a correct economic definition of retail sales?

Mr. Mitchell: Could you refer to the particular part of the rather conglomerated Exhibit No. 5 so that Mr. Curry will know what specific definition, if any, that you refer to?

779 By Mr. Tincher:

"Q. My question, Mr. Curry, related to your

answer which I noted down at the time you were answering Mr. Mitchell's question, that Exhibit 5 contained a definition of retail sales?

"A. Yes, sir.

"Q. I want to know, first, and I believe you have answered that it is your company's definition of retail sales, is that correct?

"A. Yes, sir.

"Q. Now, from whom did you get the definition of retail sales?

"A. This is a commonly known thing in the industry. To tell you exactly where I first learned it would be almost impossible. It has been known to me throughout my years in the industry.

"Q. And you have become acquainted with it, I take it, through your contacts with people in the B. F. Goodrich organization?

"A. Yes, sir.

"Q. Are you an accountant, Mr. Curry?

"A. No, sir, I am not.

780 "Q. Have you pursued any study in the field of merchandising?

"A. Only the studies as developed through training with B. F. Goodrich Company.

"Q. Would that include any graduate study at the University of Akron?

"A. No, sir, it does not.

"Q. Could you tell us how the prices which are charged to the various customers who fall within this group of the fleet national accounts compare with the prices which your franchised dealer, for example, would charge to a subdealer for tires that he sells to be resold?

"A. No, sir, I could not, with accuracy.

"Q. Generally speaking, isn't it as low or lower than the dealer's price of tires for resale?

"A. I don't think you can say that because as I understand the fleet national situation, these accounts are priced to some degree on the basis of the service that is rendered to the account.

"Q. Does your franchised dealer have anything to say in arranging for what service he will be performing in supplying the national account customers?

781 "A. My answer would have to be on hearsay, since I am not in that department. It is my opinion that franchised dealers are consulted about the arrangements that are made with national accounts.

"Q. You would know about your company-owned stores. Are those dealers and distributors consulted in arranging for the service that would be supplied along with the delivery?

"A. You are referring to company stores, not dealers and distributors?

"Q. Yes.

"A Company stores are consulted about the pricing arrangement to national fleet accounts, generally where the home office is in a store market, where that store is apt to handle a large percentage of that business.

"Q. But if the particular store is in an area where only a small amount of business is done with national fleet accounts, he might not be consulted, you say?

"A. He might not be.

"Q. Is the percentage of commission paid to your store operator the same in all instances on these fleet national accounts, or does that percentage vary?

782 "A. It is my understanding it is all the same.

"Q. Would that be true even though I assume that service which he performs in addition to delivering the tires would vary from one account to another?

"A. It is my understanding that it is still the same.

"Q. Could you say whether that is true also with reference to the franchised dealers?

"A. No, sir, I cannot.

"Q. Who in your organization would hold a position similar to yours, but with reference to your dealer sales group, Mr. Curry?

"A. I think the person that you want the name of would be A. E. Senne.

"Q. Is he comparatively new in that position?

"A. Yes.

"Q. Who was his predecessor in that position?

"A. That is a newly created position.

"Q. How recently created, Mr. Curry?

"A. Within the past 90 days.

"Q. What was the organizational setup with reference to overseeing the activities of your franchised dealer group prior to this organization?

(Discussion off the record.)

783 By Mr. Tincher:

"Q. Does the B. F. Goodrich Company have more than one wholesale price that it makes available to its dealers and store operators?

"A. Store operators are all on the same cost basis. I cannot answer for the dealer organization. I am not familiar with your structure.

"Q. Does the company limit the price or circumscribe the company-owned store dealer in any way as to the price he can charge?

"A. No, sir.

"Q. To subdealers?

"A. No, sir, we do not.

"Q. Is he free to set that price wherever he wants to?

"A. Yes, sir, to my knowledge.

"Q. Mr. Curry, I notice in Exhibit No. 4 of your testimony, this paragraph: This is on Page 2, the second paragraph within the portion that you marked. 'The term "net retail sales" is defined to mean the amount of net

retail sales or merchandise or services sold by the tenant on the demised premises after the deduction of terms, discounts, and allowances, and excluding city, county,
784 state, and federal sales.'

"A. I am not following you on that. Now, I am with you.

"Q. My question is: Do you know why city, county, state, and federal sales are excluded from this group defined as net retail sales?

"A. I cannot give you an answer to that. I do not have it.

"Q. In your organization, do you have a price list for sales to the city, county, and state governments which is known as the state list?

"A. We have printed a state list. I am not familiar with a list being printed for city or county.

"Q. Do you know whether that state list is used generally as the price list for which comparable merchandise is sold to city governments and county governments?

"A. I do not know that to be a fact. I have heard that that is so.

"Q. Well, from your experience with the business, do you find that generally that would be the category in which city and county sales would fall?

"A. I cannot make that as a general statement, but when you say cities, you are covering a wide range of cities and a wide range of circumstances.
785 I do know that it has been done, but to what extent, I cannot say.

"Q. Once a deal is made to the city or the county or the state, does your company treat such a sale as having been a retail sale?

"A. Would you restate the question?

"Q. When sales are made by your stores to a city or a county or a unit of the state government, does your company treat that as a retail sale?

"A. I don't want to keep dogging you, but would you ask it one more time and I hope you can put the words in there.

"Q. I want to get in such form that you can understand it. Assume that one of your company-owned stores makes a sale of tires to a county or a city government, or to a unit of the state government at the state list price, does your company treat that sale as a retail sale?

"A. That is still a retail sale because that merchandise is being used by the purchaser.

"Q. Then, in your definition, it is a retail sale?

"A. It is a retail sale because it falls within that classification of merchandise that is being consumed by the purchaser.

786 "Q. And are you familiar enough with your company's accounting practices to know whether it includes that sale?

"A. No, sir, I am not. I am not familiar with that.

"Q. And I believe you said you don't know why such sales were excluded as stated in this paragraph I read from, your Exhibit No. 4?

"A. That is right.

"Q. Have you had occasion to check any state lists that are followed by your company in making sales to state governments?

"A. Not recently.

"Q. When you did, how did the price or the prices shown on such a list compare with the prices to your smallest dealers and subdealers?

"A. I can't answer that question. I do not recall.

"Q. Now, with reference to Exhibit No. 1, you have a category shown as retail and then you have a category shown as commercial which you said is also retail?

"A. Yes, sir.

"Q. Could you give us a distinction or tell us whether

there is a distinction between the retail group,
787 and the retail commercial group.

"A. We make that distinction for this reason that there are truckers and lists of truckers in each market. We hire commercial salesmen who solicit commercial accounts, fleet accounts, and as one yardstick or one measure, we maintain this record to find out what our results are with that particular group of people.

"Q. Why do you want to keep that information in a separate category, Mr. Curry?

"A. These are people who buy frequently and whose volume of purchases are such that it justifies our regular solicitation.

"Q. And does your company take into account the volume of their purchases and the regularity and frequency of their purchases in setting the price that is charged to those customers?

"A. No, sir, it does not. That price is determined by the market situation.

"Q. I take it that the B. F. Goodrich Company would not sell to any of those fleet national accounts at a price which would be less than the cost of manufacturing and distribution involved?

"A. I cannot answer that question except to say
788 that I don't think they would.

"Q. But assuming that they will make such sales only at a price which will yield some measure of profit, are you saying that the amount of profit is determined by the competitive situation and the difficulty that your company would have in selling that particular account in view of prices that your competitors might offer?

"A. Yes, sir, yes, sir, I am saying that.

"Q. Well, could you say whether the sale price of a particular type of tire in the retail retail category would be the same or greater or less than the sale price of the same type of tire to a retail commercial account?

"A. Would you restate your question? I think I understand it, but I want to be sure.

Mr. Tincher: Let's have the reporter read it.

(Question read.)

The Witness: It could be greater, it could be less, depending on the market.

By Mr. Tincher:

"Q. Could the sale price to your commercial account in some instances be less than the sale price to the dealer of that particular tire?

789 "A. I couldn't answer that question.

"Q. You know, as a matter of fact, that it is many times, don't you, Mr. Curry?

"A. Well, off the record?

(Discussion off the record.)

By Mr. Tincher:

"Q. Go ahead and make your statement for the record, then.

"A. That is a question about which I do not have direct knowledge.

"Q. Don't you have general knowledge though, from your acquaintance with the business and the years you have been with the B. F. Goodrich Company?

Mr. Mitchell: I believe, Mr. Tincher, this witness has tried obviously to give you information where he has it. He has qualified some of his answers out of necessity where he does not base it on personal knowledge or experience. I believe he has twice, now, tried to give you an explanation for his inability to answer a question. You have repeated at least twice, and I think that should be sufficient for the record.

(Discussion off the record.)

790 Mr. Mitchell: Let the record show, if I may, gentlemen, that in an off-the-record discussion, upon the suggestion of a question by Mr. Suntum that his own

participation in or experience in sales to fleet accounts at prices comparable to those of dealer prices, his experience would go back more than or equal to a period of ten years, and that within the limited recollection of such experience, he can recall no instance when, as a store manager, he sold to a fleet account at a price less than dealer price.

If you think that is not a fair summary, I will welcome adjustments.

By Mr. Tincher:

"Q. Now, Mr. Curry, with that statement, can you recall that some of the fleet accounts were sold at prices as low as the price to your subdealers?

"A. You are referring to associate dealers in the store?

"Q. Yes.

"A. No, I cannot, at that time.

"Q. When you were connected with company
791 stores at district level, did you have access to the information showing the price at which the company was selling its national fleet accounts?

"A. No, sir, I did not.

"Q. You wouldn't be able, then, to compare that price to the prices to associate dealers, would you?

"A. No, sir, I can't.

"Q. Do you have information now since you are working in the home office of the company from which you can make such comparisons?

"A. Yes, sir, I can.

"Q. Will you tell us how the price, the representative price or customary price to the company's fleet national accounts compares with the price to associate dealers of the company?

"A. I have not made such a comparison.

"Q. But you do have access to the information?

"A. I have access to those records, yes.

"Q. Well, without having made a specific comparison, do you know from your contact with that information or from having it available to you how those prices compare?

792 "A. It is my opinion that the prices to the fleet national accounts are somewhat higher than those we charge dealers.

"Q. When a local manager for a company that is sold tires on a national account basis needs some tires, does he communicate his order to the company home office or to the local dealer?

"A. You are referring to those instances where the individual wants the tires for his own car?

"Q. No, in any local manager, we will say, district manager, plant manager, or terminal manager of some company that has a national account arrangement with your company. Where does he get his tires and how does he get his tires?

"A. For his fleet or for himself?

"Q. For his business, for his fleet?

"A. He will draw a requisition through his company, or a purchase order, and present that order to our dealer or our store.

"Q. And then the delivery is made there?

"A. By the dealer or by the store.

"Q. Does B. F. Goodrich Company keep sales representatives in the field constantly to contact these

793 fleet national account managers, or the people who deal with you on a national account basis?

"A. The home office people, yes, they do.

"Q. Do they, in that solicitation, also call on your franchised dealers or your store operators?

"A. Off the record.

(Discussion off the record.)

The Witness: Yes, they will contact the stores or the dealers to improve relations and service.

Mr. Tincher: I think that is all the questions I have, Mr. Curry.

Mr. Mitchell: I have just one point, Mr. Curry.

**Redirect Examination,**

By Mr. Mitchell:

"Q. Several questions were addressed to you on cross-examination with regard to sales to states or local governments and the reason for whatever distinction there may be by your company between such sales and other sales to consumers, from the context of your answer,
794 it is apparent that you are not intimately or personally familiar with this. I simply want to ask: Are you familiar, from whatever experience with your company you may have had, with the practice of inviting bids and having bids submitted by manufacturers or retailers to city, state, county governments?

"A. Only by hearsay.

"Q. Do you know whether or not some distinctions that may appear in your company records would have reference to such a practice and would consider bids submitted on invitation by some governmental authority as distinguishable from other sales to consumers?

"A. I do not know that.

Mr. Mitchell: That is all.

Mr. Tincher: No further questions.

(Deposition closed at 3:30 p. m.)

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796 **DEPOSITION OF MILAN ZAVESON.**

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798 **MILAN ZAVESON,**

of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed and testified as follows:

**Direct Examination,**

By Mr. Mitchell:

"Q. Will you state your name, please?

"A. Milan Zaveson.

"Q. What is your home address, sir?

"A. 1837 Carter Avenue, Akron 19.

"Q. Just for the record, in the State of Ohio?

"A. Yes.

"Q. What is your present title or position and with which employer?

"A. I am the general auditor of the General Tire and Rubber Company.

"Q. Are your offices in the home office of General Tire and Rubber Company here in Akron, Ohio?

"A. Yes.

"Q. Would you give us your office address?

"A. 1708 Englewood Avenue, Akron, Ohio.

"Q. For how long have you been employed by the General Tire and Rubber Company, Mr. Zaveson?

799 "A. Since September, 1937.

"Q. Prior to your employment by General Tire and Rubber Company, did you work in some other part of the rubber industry?

"A. No, sir.

"Q. What was your first position with the General Tire and Rubber Company?

"A. Bookkeeper and accounts payable clerk.

"Q. In what office?

"A. In the Akron office.

"Q. Have you been employed in the Akron, Ohio, office of General Tire and Rubber Company at all times since 1937?

"A. Yes, I have.

"Q. For about how long did you hold this position as bookkeeper and clerk?

"A. From 1937 to 1941, I worked as a bookkeeper and accounts payable clerk, and during that tenure, I don't know at what time, but I became head of that department.

"Q. In 1941 did you advance to a different position?

"A. In 1942, I went in as an audit clerk, in the Auditing Department.

800 "Q. And what, generally, were your duties as auditing clerk during and after 1942?

"A. I did several thing One, I developed the audit program a little bit stronger for our general program, and I also worked in the area of developing the field program which had to do with the audit of our warehouses, our stores, and our branches.

"Q. And for how long did you hold that type of position after 1942?

"A. I stayed in that work up through 1945.

"Q. And at which time, what position did you take?

"A. In 1946, I went back and managed the Accounts Payable Department.

"Q. For what period of time, sir?

"A. One year.

"Q. And thereafter, what did you do?

"A. Came back into the Auditing Department.

"Q. And for how long did you stay and in what position at that time?

"A. From 1947 on until 1954, I worked in further developing the same program that I had previously started doing, and also went out in the field and did some
801 work myself in the field.

In 1954, I became a general auditor.

"Q. Prior to 1954, you indicated that you went out into the field, I take it doing regular audit work?

"A. Yes.

"Q. In that connection, did you call upon and investigate or examine the books and records of your company's stores as well as warehouses or other parts of its establishment?

"A. Yes.

"Q. And that extended until 1954, I believe you said?

"A. Yes.

"Q. At that time, did you advance to the position of general auditor?

"A. Yes.

"Q. And that is the position you still hold?

"A. Yes.

"Q. I take it from the title that yours is the top auditing position in the accounting setup of your firm, General Tire and Rubber Company?

"A. That is correct.

"Q. In that position, am I correct in thinking you would be responsible for whatever internal audit procedures the classifying of records, examination of records of
802 your company at its several levels?

"A. Yes.

"Q. That may be carried out?

"A. Yes.

"Q. I think it would be apparent from your answer that this is true, but just for the record, that would include the setting up of and examination of records in your company-owned stores?

"A. Setting records for our use and not for—if we were setting records for that use, it would be on a recommendation basis. For our purposes, we establish the records that we believe feasible.

"Q. To the extent that your company deems a particular system or class of records important to its control of such stores——

"A. Right.

"Q. ——that would fall under your direction?

"A. Yes.

"Q. The setting up of a system and the periodic examination of records that your company felt pertinent?

"A. Yes.

"Q. Mr. Zaveson, are you familiar with the ac-
803 cumulation of an exhibit from accounting and other records of your company in 1954, which work, I suppose, must have been carried out in conjunction with the law department of your employer, General Tire and Rubber Company, for presentation to some part of the Wage and Hour Division?

"A. Yes, I am, and this is it right here. I worked on that—you say 1955. I am not too sure of the date. I did work with our legal department in this area.

"Q. Would you turn to General Exhibit 1 of a pamphlet that you have just referred to?

"A. Yes.

"Q. And see a letter dated June 3, 1954. Would that help you recall?

"A. Right.

"Q. That the letter, made Exhibit 1 to this pamphlet, was current at the time it was prepared?

"A. Yes.

"Q. I will ask you if you will make this pamphlet Exhibit 1 to your testimony, please, sir?

"A. Yes.

(The said document was marked as Deposition Exhibit No. 1, Witness Zaveson, by the Notary.)

804 By Mr. Mitchell:

"Q. Now, then, Mr. Zaveson, you have already indicated that you participated in the accumulation and preparing of this sheaf of documents that has now been Marked Exhibit 1 to your deposition. Would you just look through it and tell me whether or not it is an accumulation of bulletins or accounting forms from the records of General Tire and Rubber Company which had been in use during or prior to 1954?

"A. Yes, these are the records that we used at that time.

"Q. And, Mr. Zaveson, I will ask you to turn to the first item in this sheaf of documents which has been made Exhibit 1 to your deposition, which item is a three-page typewritten writing entitled 'Notes Regarding Exhibits of the General Tire and Rubber Company,' and I will ask you to look down about two-thirds of the way down, the opening paragraph of that particular writing and find the statement which starts, 'General treats all sales by its stores as retail sales in the first instance and subsequently breaks out such sales so that sales to subdealers are separately treated,' and continuing, 'In its treatment of tire sales to commercial accounts, Gen-

805 eral recognizes all such sales as retail sales, irrespective of the number of tires purchased, the character of the purchaser, the price paid, or the use to which the tires will be put.' Do you find that statement at the place indicated in your Exhibit 1?

"A. Yes, I do.

"Q. And over at the end of the same set of notes in the same exhibit, do you find the statement, 'General has uniformly treated its sales as in two classes: Wholesale sales to subdealers and retail sales to consumers and has

treated all sales to commercial accounts as retail sales.' Do you find that statement?

"A. Yes.

"Q. With regard to those statements, I will ask you first, sir, if as would be apparent from their position in this record, does that represent the statement of your employer's position at the time that this memorandum was prepared and submitted?

"A. Yes, it does.

"Q. Do you know whether or not those statements continue to represent your employer's position today on the subjects covered?

806 "A. I would say they are almost exactly the same.

"Q. In other words, the definitions or classifications stated in the parts that I have just read from this Exhibit are current and are accepted today by your company?

"A. I would say so.

"Q. Now, from your experience since 1937 in the tire industry as an employee advancing up to an executive position in the Accounting Department of General Tire and Rubber Company, and based upon your experience as an auditor in the field, does that also reflect your own recognition and your own classification of sales by your company stores?

"A. Yes, it does.

"Q. This was written, was it not, with respect to the retailing done by stores owned, managed, and operated by your employer, General Tire and Rubber Company?

"A. Yes.

"Q. From your experience with and knowledge of independent tire dealers who may have a franchise or another arrangement under which they sell General Tire and Rubber Company products, would you say that the same classifications are true and the same definitions pertain?

807 "A. Yes, that is a basically—they are basically the same.

"Q. Would you go through the sheaf of documents which has been made Exhibit 1 to your testimony and indicate what the several exhibits in it are. The first item which I have just read from and the title which I have given is, I believe, self-explanatory?

"A. Yes.

"Q. Now, then, following that, there is that which is marked 'General Exhibit 1' and appears to be a letter addressed to all retail stores dated June 3, 1954. Would you state what the significance of this would be?

"A. This, at the time we were working on this, was to establish our retail stores and this is produced as evidence that we do class our stores as retail stores and they are supervised by a manager of retail stores.

"Q. And would you next turn to the General Exhibit 2, so entitled, headed in bold type, 'Billing Instructions' and tell us what the significance of it may be?

"A. This had to do with our subdealers and some of our stores could have subdealers.

"Q. Would you explain briefly what that term means?

808 "A. Well, a subdealer would be possibly a small operator within the same town as the retail store, and he may—the dealer, in expanding his business, may tie in this fellow to do business, and if they properly recorded with us, they would participate in the commissions on making deliveries to these guys at the retail level.

"Q. Am I correct in thinking, Mr. Zaveson, that the sales to these sub-dealers which you have just described and which are referred to on this Billing Instructions made General Exhibit 2 in the sheaf of documents we are talking about, would represent the kind of sales for resale

which are referred to in the definitions earlier in this same exhibit?

"A. I would say so.

"Q. And pursuant to that definition and to your understanding of the usages in the industry, that would be the only type of sale that your stores might make that would be classified as a wholesale or, in any event, a non-retail sale?

"A. I would think so, yes.

"Q. Now, then, would you, without going into great detail explain the general use and function of that
809 which has been marked Exhibit 3 to this sheaf of documents, and state what it is?

"A. This is our financial statement used by our retail stores at this time.

"Q. In that connection, sir, would you indicate the date on it so that we may know when it was in current use?

"A. This was August of 1945, this particular one here.

"Q. All right, sir.

"A. It is produced on a local level for purposes of their records and then it is sent into Akron also for purposes of our records for consolidation.

"Q. When you say it is produced on the local level, do I construe that properly to mean that the information is entered at a retail store?

"A. Yes.

"Q. By a bookkeeper or clerk?

"A. Yes. Our retail stores are autonomous. They have their own complete set of accounting records.

"Q. And this is an operating statement that was in use at least during August, 1945, and thereabouts?

"A. It is an operating statement and balance sheet also.

"Q. All right.

"A. We have added expenses to keep it whole.

810 "Q. Thank you for that. In the event that I incorrectly refer to anything in these records, I would appreciate your elaborating on it or point it out. This set of documents, then, represents the kind of accounting records that would be submitted and were submitted by one of your stores—any one of your stores?

"A. Yes.

"Q. To the home office of General Tire Company in the regular course of business?

"A. That is correct.

"Q. Now, then, I believe that covers over to the next which is Exhibit 4 that bears the date August, 1949, and would appear to be the same general kind of operating statement, balance sheet, and so forth which you have just described.

"A. That is correct.

"Q. Do I understand this to be simply the example of the kind of accounting form that was used during and about August, 1949?

"A. That is correct.

"Q. For the same purpose?

"A. Yes.

811 "Q. Now, then, sir, would you turn to that which is marked General Exhibit No. 5 in the sheaf of documents which has been made Exhibit 1 to your deposition and describe it, please.

"A. This is a page of a manual used by our Billing Department as manual instruction that would go out to our billing points, as to the method that they should bill.

"Q. And it would seem from its title that it relates to this subdealer program. Do I construe that to mean the same thing you were talking about a short while ago in connection with another exhibit?

"A. That is correct.

"Q. Namely, the same by one of your stores to a sub-dealer in the store's community for resale by that sub-dealer to the public?

"A. That is correct. The billing instructions in this billing procedure manual, the billing instructions would go out very rapidly and later on become a part of the manual. This is a tie-in of the two.

"Q. And the reference which you just made is to that which appears as General Exhibit 2 and General Exhibit 5?

"A. That is correct.

812 "Q. Both of which are a part of what you now know as your Exhibit 1?

"A. Yes.

"Q. Is this billing procedure manual about which you have just testified, General Exhibit 5 in this sheaf of documents, still in current use by your company?

"A. Basically it is the same thing, yes.

"Q. All right, sir.

Now, then, would you turn to the last item of your Exhibit 1 and describe what it is, sir?

"A. This is again a balance statement and operating expenses which is a little more current than the previous one which you were shown. Basically, it is the same, but it is an up-dated form from the previous ones.

"Q. By current, I am sure you meant that it was current?

"A. At this point.

"Q. In July, 1954, when this whole exhibit to your deposition was accumulated and prepared?

"A. That is correct.

"Q. Now, you have already indicated that you participated with others in the employment of the General Tire and Rubber Company in the accumulation and preparation

of what has been made Exhibit 1 to your deposition.

813 Do you remember generally the use to which this exhibit was to be put?

"A. It was produced for the purpose to establish with the Labor Department that our retail outlets were retail outlets and not wholesalers. I think that may be right in here that in this first page of this same booklet—in fact, there are two spots that really bring this out. That is where we say, 'General regards itself as the wholesale and its independent dealers and company stores as exclusively retail outlets except to the extent that they resell to some dealers.'

"Q. Yes.

"A. Then, again, I think we stated back here in the summary it brings it out very strongly in the same way, but basically this is what we were working on and established these exhibits to bring that point out.

"Q. In short, then, sir, this Exhibit 1 to your deposition was prepared in July or thereabouts, 1954, to express the position of General Tire and Rubber Company with regard to the nature of the operation of its company stores, and to illustrate how its own records——

"A. Yes, sir.

"Q. ——supported its position?

"A. That is correct.

814 "Q. And you recall that it was used in connection with some presentation to the Department of Labor?

"A. That is correct.

I might say this that the reason the legal department asked me to work on this stuff was because of my familiarty with all lines of it. We have people that might be familiar in certain areas, like our billing people would be familiar with billing, where in my position, we cross all lines.

"Q. Now, then, sir, at my request, have you brought

in examples of records that are in current or immediately past use by General Tire and Rubber Company in connection with the suggested system of accounts to be used and followed by your company stores and with regard to the reporting of business done at your company stores to the home office?

"A. Yes, I did.

By the way, as far as our company stores are concerned, this system is not a suggested system, it is a system that must be used.

"Q. Thank you, sir, again, for that clarification. The records to which I just referred and which we will shortly introduce are those that are furnished by your company stores?

"A. Yes.

815 "Q. And am I correct that this system is offered to your independent tire dealers who may or may not take and institute the system?

"A. Yes.

"Q. One other item here, please, sir. I noticed in the notes which are the first writing in your Exhibit 1, it is indicated that General Tire and Rubber Company in 1954 operated 69 company stores through a separate controlled subsidiary corporation for each store. Do you know the number today of the General Tire and Rubber Company stores?

"A. I use a different figure than possibly the records might indicate, and I will explain that. There are a little over 200. Now, I use a figure of 250 and the reason I do that is because you take Cleveland as an example; we have a retail store there. That store then has five branches. For my purposes of the work I have got to do, those branches to me are just as much work as the main store. In my category, I would say there are approximately 200,

with another 50 of the type that I am talking about, with branches.

"Q. So that your figure of 250 would represent the actual number of locations?

"A. Yes.

816 "Q. But not necessarily the actual number of separate stores?

"A. Yes, and this is now an estimate. I would have to actually check.

"Q. I can appreciate that.

"A. It is close to that.

"Q. Now, with regard to the balance of this statement from the notes in your Exhibit 1 that these stores are operated through separately controlled subsidiary operations, that I am sure is true since it was stated in 1954. Does that continue to be the method of the operation of company stores by General Tire and Rubber Company?

"A. In some instances, yes.

"Q. With regard to the records I have asked you to bring in, I first hand you photostats or photocopies of accounts headed 'Retail Stores Department Chart of Accounts,' and I will ask you to summarize briefly and state what that may be?

"A. In accounting circles, you always work from a chart of accounts, and this is the established record that we use and the account numbers to classify items in our retail stores.

817 "Q. And does this summarize the system of accounts that is followed in your retail—in the company-owned or company-operated retail stores?

"A. Yes.

"Q. Is it similarly the system of accounts that is offered to your independent dealer?

"A. Yes.

"Q. Would you make that Exhibit 2 to your deposition, please?

"A. Yes.

(The same document was marked Deposition Exhibit No. 2, Witness Zaveson, by the Notary.)

By Mr. Mitchell:

"Q. With regard to your Exhibit 2, please, sir, would you state whereabout on it the sales breakdown is shown and how sales are classified in accordance with this system of accounts?

"A. Take the second there, the right hand side, you will see a major category of captions, trading accounts, starting out with account 100, sales accounts, and then our breakdown of sales, and we are interested in the
818 amount of new General trucks, new General passenger, et cetera, down the line. This is the type of classification we use in our sales accounting.

"Q. I take it, then, that in accordance with this system or chart of accounts, all sales, regardless of the type of purchase, would be entered through the same ledger accounts, and that such accounts are numbered 101 through 116?

"A. That is correct.

"Q. And your identification of classification of sales is by type of product rather than by type of customer?

"A. That is correct.

"Q. Is that constant, sir, with this idea that all sales through your retail—the company's retail stores are considered to be retail sales in the first instance, and then to the extent that any sales are made for resale, those are later adjusted out of your sales account and represent the only other category of sales?

"A. Yes, sir.

"Q. Now, then, sir, at my request, have you brought in a blank invoice form?

"A. Yes.

819 "Q. Could you please describe generally its function and regular use?

"A. This is a standard invoice form that we use in all of our retail stores, and it is for the recording of all the sales as shown on this Exhibit 2 that we just talked about.

"Q. Right. Would you make that Exhibit 3 to your deposition, please?

(The said document was marked as Deposition Exhibit No. 3, Witness Zaveson, by the Notary.)

By Mr. Mitchell:

"Q. Now, then, sir, with respect to that which is now marked Exhibit 3 to your deposition, you have stated that this is the invoice form and I take it it is the one written up by the clerk or salesman at the time a sale is made?

"A. Yes.

"Q. Is there any place on it by which the type of sale classified according to a particular customer is noted or is indicated?

"A. No, sir.

"Q. So that a sale to any account or any customer, regardless of whether it is for resale or not would be entered and written up originally on the invoice form made

820 Exhibit 3 to your deposition?

"A. That is correct.

"Q. Now, then, sir, moving on through the system of accounts, you have brought in at my request an accounting spread sheet headed 'Daily Summary of Sales and Collections,' and I will ask that you make that Exhibit 4 to your deposition?

"A. Yes, sir.

(The said document was marked as Deposition Exhibit No. 4, Witness Zaveson, by the Notary.)

By Mr. Mitchell:

"Q. With regard to that which has been marked Exhibit

4 to your deposition, sir, would you please state first what its general purpose and function may be?

"A. This what we would call part of our books of original entry. The function of that sheet is to summarize the invoices and receipts. We use both in here because it is a combination sheet.

We summarize all the invoices so that we can classify, again, the various items, and if you take a look at the sheet, you can see where you have got a place for invoice number.

"Q. For the record, sir, are you referring to the
821 reverse side of this sheet which is entitled in bold print 'Daily Summary of Sales and Collections'?

"A. Yes, sir.

"Q. All right, now, under that caption, go ahead, sir.

"A. Under that caption, you have got invoice or receipt number. Now, this Exhibit 3 would be recorded on this sheet, and this is then our control of numbers, also, and our classification which then becomes summarized on a monthly basis.

"Q. That was what I wanted to say. The summary or accumulation sheet made Exhibit 4 to your deposition, on its reverse side, would contain a restatement of the information which was originally entered on your Exhibit 3?

"A. That is correct.

"Q. The invoice itself?

"A. Yes.

"Q. And that would start with the invoice number in the far left column, and I take it the items sold according to such invoice would be spread across the page?

"A. That is correct.

"Q. Now, then, in spreading it, I see that the column heads are all entitled by names of product or types
822 of product of General Tire and Rubber Company?

"A. Yes.

"Q. For example, 'New General truck tires,—2'?

"A. That is right.

"Q. And so on across the page to 'Wheel Alignment' and other captions?

"A. That is correct. You also have the account number right above it that refers back to this chart of accounts.

"Q. Yes. Again, the classification here is by product rather than by purchaser or type of purchase?

"A. Yes.

"Q. And that is consistent with your company's position throughout?

"A. That is correct.

"Q. Throughout these accounting records?

"A. Yes.

"Q. And this indicates that it is a daily summary?

"A. Yes.

"Q. At what point is this prepared? At the company store?

"A. Yes, that is company store records.

"Q. Now, then, sir, you have brought in another type of record which is in three sheets. I hand it to you
823 and ask you, generally, what it is and how it is used?

"A. This is the current form that we use for our balance sheet and profit and loss statement analyses of expense which I have shown. This is the current one in use.

"Q. May I interject here, sir, that you are referring to that which was entitled General Exhibit 6 in the pamphlet or sheaf of documents made Exhibit 1 to your deposition?

"A. That is correct.

"Q. And what you have just said is that which we will now introduce is the current version of this same type of form?

"A. Yes.

"Q. Would you have it marked Exhibit 5-a, 5-b and 5-c to your deposition?

"A. Yes.

(The said documents were marked as Deposition Exhibit Nos. 5-a, 5-b and 5-c, Witness Zaveson, by the Notary.)

By Mr. Mitchell:

"Q. Now, then, sir, in connection with Exhibits 5-a, 5-b, and 5-c which together make up a single type of accounting form, at what point are these prepared? By point, I mean at the company store or the home office?

"A. At the company store.

824 "Q. For what interval or what period of time?

"A. They are made up each month.

"Q. And what is the name by which this system of reports is known?

"A. I don't follow you.

"Q. Is this a comprehensive accounting statement for the month?

"A. Yes, this is a balance sheet and profit and loss statement for the month and year to date.

"Q. Right, and would you indicate whereabouts on this set of records sales are reported and classified?

"A. They are reported on page 2, captioned Profit and Loss Statement.

"Q. And for our reference in the record, is that the lower part of the reverse side of Exhibit 5-a?

"A. It is both parts. It is top and bottom, the difference being the top is for the month, the bottom is year to date.

We carry that onto the next page also.

"Q. All right. That would be, then, the whole of the reverse side of 5-a, and 5-b on the face of it?

825 "A. And the reverse side of 5-b.

"Q. All right, now, then, that we have got it located,

would you describe how the sales are reported and what categories and so forth are shown at this point in the statement?

"A. If you follow through, we started out with this Exhibit 3 which is posted to Exhibit 4.

"Q. Yes?

"A. Exhibit 4 is summarized by the month, and posted to what is commonly known as the general ledger. I don't have any exhibit here of the general ledger.

"Q. Yes?

"A. From the general ledger, this accounting statement, balance sheet and profit and loss statement is posted.

"Q. Now, we follow uniformly right straight through our classifications, and this summarization here is the final summarization, the determining of profit or loss in the store and also the classifications necessary, and it is consistent with what we have previously said here.

"Q. Right, and that is exemplified by the fact that this profit and loss statement for a given month which
826 appears across the reverse side of Exhibit 5-a and the face of 5-b has as its first line 'Sales' and then by columns that extend to the right, first a total, and then a breakdown of that total, again, according to products?

"A. That is correct.

"Q. Now General truck tires and tubes, and next, new General passenger tires and tubes, and so on across the spread sheet?

"A. Right.

"Q. Again, is there any classification on this accounting report as to the character or type of purchaser?

"A. No, sir.

"Q. Does any other part of your Exhibit 5-a, 5-b, and 5-c relate to sales or sales analysis which we have not yet discussed?

"A. I don't think so.

"Q. Now, then, also at my request, you have brought in an accounting form or statistical data form, perhaps, headed 'Monthly Sales Analysis' which I will ask you now to describe generally and state what purpose it serves?

"A. This is used as an aid to the managers to promote better sales, and they may or may not send this into
827 the home office. This is a tool used basically for them to get some quick figures that they use. This is on the local level of the store manager. I don't have extra copies of this one, but these are basically what they are used for. The local manager uses them.

"Q. Well, from what you have just said, are for sales control purposes?

"A. Yes.

"Q. And I think you also indicated that they do not go to the home office to become a part of the permanent accounting records.

"A. Yes.

"Q. I will ask you to inspect them briefly, or from your own knowledge of them indicate whether or not there is any distinction or difference as far as classification of sales or putting sales into different categories according to purchases?

"A. No, there isn't.

Mr. Mitchell: Let the record show that we will not make this an exhibit, but it is available to counsel for adversary if you have any questions about it, or to make it an exhibit.

828 (Discussion off the record.)

By Mr. Mitchell:

"Q. Now, then, sir, at what point or whereabout in this system of accounts exemplified by your Exhibits 2 through 5, inclusive, are sales for resale reported or adjusted out, or

in what manner are they handled, and I mean sales for resale by your company stores?

"A. Well, this is the only way they are reported, the way they are right here.

"Q. And how are they—what adjustments are made to distinguish the sales for resale from sales to consumers?

"A. We still don't have any. This is the only type we have.

"Q. At any point in the accounting or control for your company stores or any purpose, is it important to General Tire and Rubber Company to segregate and to value the sales made by its company stores for resale?

"A. I don't follow you. Will you repeat that?

"Q. Yes, sir. Does it become important at any point or for any reason for General Tire and Rubber Company to know how much, that is the value of sales for resale to subagents, subdealers I believe the term is, by
829 its own company stores?

"A. I don't think so.

"Q. In connection with, for example, the compensation of store managers, are sales for resale by the store treated any differently than sales to consumers?

"A. I don't think so.

"Q. Mr. Zaveson, the term 'national accounts' apparently is in regular use in the tire industry. Would you tell me generally what national account transactions consist of?

"A. Well, a national account is any outfit that might have trucks or vehicles that would need servicing any place in the United States. They might have a lot of them, a lot of areas, and these are contracted for by us at General Tire and Rubber Company, and that account may be serviced any place.

"Q. And in connection with the servicing of that account by one of your company stores, what functions—

what part does the company store, that is, at the retail level—play in the servicing of this account?

"A. He is supposed to, of course, first identify the account as a national account, and then he is supposed to service that guy in any way necessary, and if it is
830 to put tires on the vehicle, he is to withdraw tires from his warehouse and put these tires on that account.

"Q. Yes?

"A. And he is not to bill him.

"Q. Could you tell us how the billing is done?

"A. The billing is done in the home office and we reimburse that store for the handling that might have been involved. It could be the mounting of the tires, it could be the balancing, or it could be in that area. We will reimburse him on that basis.

"Q. Yes. When you say reimburse, could I perhaps construe that to mean compensate him for some service?

"A. Yes, and also I forgot to say whatever tires he pulled out of his warehouse, whether it would be one, two, or five, we replace them tires back in there.

"Q. In connection with the ones he pulled out to put on a vehicle for a national account?

"A. Right.

"Q. And I take it, then, some form is submitted by the retail store?

"A. Yes.

"Q. Which reflects this store to a national account?
831 "A. Yes.

"Q. And the retail store is then compensated for the service involved?

"A. Yes.

"Q. And as you have also indicated, the inventory is replaced?

"A. That is correct.

"Q. Is that considered a sale by the company store?

"A. No, sir.

"Q. And you have already indicated that the soliciting of the business and the arranging for the national account agreement and also the billing is also done through the home office of the General Tire and Rubber Company?

"A. That is correct.

"Q. With respect to the same sort of transaction by one of your independent dealers, and by the same sort of transaction, I mean a national account, does the same circumstance follow?

"A. It would follow exactly the same.

"Q. And, again, your independent dealer would submit some sort of record of the service it rendered pursuant to a national account entered into—national account agreement entered into by the home office of the General Tire and Rubber Company, and the independent dealer
832 would likewise be compensated for the service rendered?

"A. And his tires would be replaced.

Mr. Tincher: May I interpose, Counsel? May I suggest that in this area you not lead the witness. I am anxious to have the witness put his answer in his own words, please.

Mr. Mitchell: I do my best in respect to your objection.

By Mr. Mitchell:

"Q. To clarify the record, would you state again specifically with reference to the independent tire dealer of General Tire Company how it works under a national account and I recognize that it may confuse you a little, but I am asking you to restate?

"A. All right. It is exactly the same in either case whether it is a store or an independent dealer. He would service the account, which account would have to identify itself first, and if it is a case of supplying tires, he would supply whatever tires were necessary for this account and

he then would report this transaction to us and we would replenish his inventory to him and reimburse him for the services he rendered. It is our account.

833 Then, the home office would bill the national account on whatever basis they want, or whatever area they would want to bill them.

"Q. In connection with the national account, does either the manager or salesman at one of your own company retail stores, or an independent tire dealer, have anything to do with setting the price or terms of payment by one of these national accounts?

"A. No, sir.

"Q. In respect to your independent dealers who handle and sell General Tire and Rubber Company products, will you state, please, sir, whether or not the quantity of products they sell is one factor in determining the cost of such products to them, and I am asking you if there are any adjustments based on the quantity of products purchased over a given period by these independent dealers?

"A. For price purposes?

"Q. Yes, or for any other purpose.

"A. I am not too familiar with this area as to the pricing involved there. I wouldn't be familiar enough with that to make a statement here.

"Q. Do you know whether or not for any purpose

834 the delivery of General Tire and Rubber Company products by an independent dealer, pursuant to a national account agreement, is considered part of the sales by the independent dealer from your home office point of view?

"A. No, sir.

"Q. Do you know whether or not, if there may be some adjustment in price or some adjustment for any purpose, based on quantity, whether or not the independent dealer's deliveries are according to a national account arrangement, whether that goes into the quantity so used?

"A. I still say in relation with a national account to me, delivery is entirely a home office deal, but all we want that guy to do is to service that account, and we reimburse him that way.

The records beyond that, replenishment of stock, then become entirely an area of ours, the home office.

"Q. But so far as you know, the statement that you just made that a national account is a home office deal would be consistently reflected in any of the records that are kept, and would be consistently reflected so far as you know?

"A. That is right.

835 "Q. Any dealings between home office and an independent dealer?

"A. That is right.

"Q. In connection with the commissions or compensation that are paid to personnel of the company-owned stores, are different commission rates paid on different kinds of sales, and by kind of sale, I mean whether or not resale or single sales?

"A. Not that I know of.

"Q. I think it is emphatic, sir, from the definitions and classifications that have already been read into the record from your Exhibit 1, but just to be specific, does General Tire and Rubber Company, or do you by reason of your experience in the industry, recognize any distinction in such sales as fleet accounts or sales to commercial users of tires as opposed or distinguished from sales to an individual user?

"A. I don't think so.

Mr. Mitchell: I believe that is all.

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*Testimony of Milan Zaveson*

836 **Cross-Examination,**

By Mr. Tincher:

* * * * * * * *

839 "Q. Are you familiar, Mr. Zaveson, with the sales division and its organization within the General Tire Company structure?

"A. Yes, sir.

840 "Q. Would you tell us, briefly, how the sales division is set up with reference to the distribution of General Tire and Rubber Company products to the franchise dealers across the country?

"A. We have—there has just been a change, by the way. We have what we call a trade sales manager, and this trade sales manager, under him, then would have a manager in charge of passenger tires, a manager in charge of truck tires, and a manager in charge of accessory materials, and also he would have the district managers under him, the 20 districts.

In what I have said here, this area does not have to do with our retail stores. Now, besides that, there is a manager in charge of retail stores.

"Q. Yes. My questions, at least at this point, relate to the distribution system through the use of franchise dealers?

"A. Yes.

"Q. Might I ask you approximately how many franchise dealers does General Tire and Rubber Company have within the United States?

841 "A. This I don't know.

"Q. Could you give us an approximate number?

"A. Oh, gosh, that would be too wild of a guess for me to say. I am not that much interested, you see.

"Q. Could you say whether or not it would be greater than the number of company-owned stores?

"A. Yes, sir, that I would say.

"Q. Is Steepleton General Tire Company at Memphis, Tennessee, classified as a franchise dealer by General Tire and Rubber Company?

"A. He is classified as an independent dealer which I imagine would be the same thing.

"Q. In that category, does he operate under a franchise issued by the company?

"A. I would say yes, but, again, I would want to reserve that. This is an area that I wouldn't get in. I know he is independent. To get into the details of whether he has got a signed franchise and such, this I don't know.

"Q. Who in your organization by name would be—strike that question.

Could you give the name of the present trade sales manager of General Tire and Rubber Company?

842 "A. Mr. Morgan J. Morgan.

"Q. And how long has he had that position?

"A. Effective December 1, 1961.

"Q. Was there anyone with that title or with duties similar to Mr. Morgan's duties prior to December 1, 1961?

"A. Yes.

"Q. Who was that individual?

"A. John Hants.

"Q. How long did he hold the position?

"A. Oh, a couple of years.

"Q. Is there a district manager in your organization who would be immediately responsible for the activities of Steepleton General Tire Company at Memphis?

"A. I would say yes.

"Q. Do you know who that district manager is?

"A. That would be Mr. Brunskill.

"Q. How would you spell that name?

"A. B-r-u-n-s-k-i-l-l, I think, I forgot his first name.

"Q. Where is Mr. Brunskill stationed?

"A. At the Memphis office.

"Q. Does General Tire have, in addition to its warehouse at Memphis, a district office there?

843 "A. Yes, sir.

"Q. How big a territory does that district office take care of?

"A. I wouldn't—I wouldn't be positive, but it stretches down into Mississippi, I am pretty sure, maybe part of Louisiana, and Tennessee. I am not too sure of the area of coverage.

"Q. I see. Could you tell me how many district offices comparable to that one the company has in the United States?

"A. Twenty.

"Q. Now, you have classified Steepleton General Tire Company at Memphis as an independent dealer. Do you have any other classes of dealers besides the so-called independent dealers and the company-owned stores?

"A. Well, you could have a subdealer.

"Q. I notice in Exhibit No. 1 to your deposition, as General Exhibit 2 in that exhibit, billing instructions, this paragraph. 'All subdealers on which this commission is claimed must be registered with Akron, and no commission is to be allowed on any sales to accounts which is not registered on this deal without specific permission from Akron.'

844 What does the registration of a subdealer consist of, Mr. Zaveson?

"A. Just going on record with Akron that he would be a subdealer.

"Q. Who puts him on record?

"A. The dealer himself would put him on record, the prime dealer.

"Q. He would simply report to the home office that I now have a subdealer and give his name and address?

"A. Yes.

"Q. Does General Tire ever question the listing of some customer of a dealer as being a proper subdealer?

"A. Gosh, that is hard to say. I imagine that it would happen, but I wouldn't know. This would be an area that I wouldn't see, basically.

"Q. Do you know whether the company sets up any criteria with respect to who might qualify as a subdealer?

"A. That I don't know.

"Q. In your Accounting Department and as general auditor, would you be aware of any criteria by which an account could properly be considered as a subdealer account?

"A. I don't follow you.

"Q. Well, would you——

845 "A. You are talking about the retail level, now, or are you talking—you see, this always confuses me.

"Q. I am speaking only with reference to who might qualify as a subdealer, specifically with reference to Mr. Steepleton in the Steepleton General Tire Company at Memphis.

For example, would General Tire Company insist that any subdealer be a person or firm who would be engaged in reselling tires and tubes?

"A. This I don't know.

"Q. Mr. Zaveson, does General Tire Company have any independent dealers who are engaged exclusively in wholesale distribution of tires?

"A. Not that I know of.

"Q. Does it have any dealers who would sell more than 25 per cent of their total volume at wholesale?

"A. That, again, I wouldn't know.

"Q. Well, from your knowledge of the business, would you assume that some of them do make more than 25 per cent of their sales to subdealers for resale purposes?

"A. In our own area, I would say no. The fact is, in

our area, I don't see any wholesale—we don't have
846 a wholesale classification.

"Q. What do you mean in your area?

"A. I mean our stores, the stuff that I check, that I am well aware of.

"Q. Company-owned stores?

"A. Yes.

"Q. Now, do you know whether there are any company-owned stores who would make sales to dealers and sub-dealers or any other persons for resale in quantities which would amount to 25 per cent of their gross volume of sales?

"A. This I wouldn't know.

"Q. Well, you check their returns, do you not?

"A. Yes.

Mr. Mitchell: I don't believe the witness understood the question.

May I interpolate?

Mr. Tincher: Yes.

Mr. Mitchell: The question had to do with the company stores and the volume of business by the company stores for resale, is that correct?

Mr. Tincher: Yes.

847 Mr. Mitchell: I believe this term "wholesale" which in the tire industry is a many-sided thing, may have confused the witness from an earlier question and I want to make sure the record is straight on it.

Do you get the context now of the question.

The Witness: No.

By Mr. Tincher:

"Q. Well, I will try to lay the foundation for it. I take it from your earlier testimony that company-owned stores do supply tires to various dealers for resale, is that correct?

"A. No. The Company stores do not supply dealers.

The company stores are our retail outlets that are selling tires.

"Q. Do the company stores supply any subdealers tires for resale purposes?

"A. Yes, yes, this could be.

"Q. All right, sir. Now, from your knowledge of the reports submitted by various company stores to your home office, do any of those company stores supply subdealers in quantities which would exceed 25 per cent of their gross volume?

848 "A. Now, this percentage would be hard for me to know. I would say that there would be various degrees of percentages, but to establish in my mind—to establish a percentage, this would be hard for me to do. I couldn't without an analysis of some kind, be able to do this.

"Q. And——

"A. There is no distinction in any records that we are checking here on that basis, you see. The area of subdealer delivery sometimes has got to do much with pricing and developing new business in relation to a retail outlet, in my viewpoint.

"Q. In your work as general auditor, do you have any concern with retail sales tax payments by the company stores?

"A. Only to the degree that when we make an audit of a place and we check their sales invoices, we would determine that in some of our test checking that the tax charged is correct.

"Q. You are aware that certain sales by your company stores do require collection of state sales taxes?

"A. Yes.

"Q. And others do not?

849 "A. Yes.

"Q. Do you check at any time to see whether the

companies are collecting and remitting sales tax correctly with reference to the sales that they are making?

"A. We would do it on this basis: They may have an accrual account, sales tax accrual account, and we would establish that that is correct. In our sales analyses, there are areas that we look to that are more important, possibly, than that area. We haven't—in the tax area, we don't get into this very strongly at all.

* * * * * * * *

851 "Q. Now to clarify your testimony further with reference to the company stores, Mr. Zaveson, I believe you have stated that to your knowledge company stores do make sales to subdealers of tires and other supplies for resale purposes. You are not in a position to say whether any of those stores would make sales in quantities of 25 per cent or more for resale purposes.

852 Now, would it be true that whether or not such company stores or some of them sell 25 per cent or more of their products for resale, you still classify those stores as retail stores?

"A. Yes, sir.

"Q. Would you state what you consider in the tire industry to be a wholesale sale?

"A. I would say a wholesale is a sale, for instance, from our standpoint, a sale made to dealers who then would resell, and sales to manufacturers, original equipment people. This, to me, would be the basic wholesaler.

"Q. Are there any other sales made either by General Tire and Rubber Company or by company stores which you would classify as wholesale sales?

"A. Company stores, I would say we don't have wholesale sales.

"Q. You have stated, haven't you, that your company stores do make sales of tires to subdealers for resale purposes?

"A. Yes, but I don't—we don't classify it in here in this area. It is a matter of pricing and recovering price through this commission.

853 "Q. And when you say you don't classify it here, you are referring to your accounting forms and your accounting procedures, are you not?

"A. Yes.

"Q. Then, with reference to the company-owned stores and the independent dealers, is it true that General Tire Company does not consider any sales made by such outlets as wholesale sales?

"A. That is what I would say, yes.

"Q. For accounting purposes?

"A. That is right.

"Q. Now, as an accountant and general auditor, Mr. Zaveson, wouldn't you consider that a substantial portion of the sales made both by your company-owned stores and your independent dealers are, in fact, wholesale sales?

Mr. Mitchell: We object to the repetition of what appears to be the same question.

Mr. Tincher: It is not the same question, Mr. Mitchell.

Mr. Mitchell: To the extent that there is a distinction which I fail to realize, I submit the witness may

854 have failed to recognize such a distinction and for my purposes, if not for his, would you state how the last question is distinguished from the one asked previously.

Mr. Tincher: The witness has not raised such a question. Let's have the reporter read the question back and let the witness decide.

Mr. Mitchell: I will agree to that.

The Witness: I said no.

By Mr. Tincher:

"Q. Your answer is no?

"A. That our company stores and our retail stores—their sales are not wholesale sales.

"Q. Is that true also of your independent dealers?

"A. To the best of my knowledge.

"Q. Then, would you say that in your opinion as an auditor and as an accountant and as a merchandiser of tires, a sale by an independent dealer within your organization to a subdealer for resale purposes is not a wholesale sale?

Mr. Mitchell: I would raise the same objection, that that restates the question previously answered twice. At least, it so seems to me and I believe the record
855 shows what this witness believes to be the case, as the general auditor of General Tire and Rubber Company, and by reason of his own experience and knowledge in that capacity.

Go ahead and answer the question, sir, but I dislike to prolong this.

The Witness: You see, I am confused from this standpoint as to the amount of subdealers. To me, you are talking like we got a lot of subdealers, and this I don't see, you see. This area I don't see. I don't see that we have a lot of subdealers, especially in our—I know in our case—in case of our company-controlled stores, we do not have a lot of subdealers because our development is on the basis of the branches of which I spoke that we have in Cleveland and not on a subdealer basis.

By Mr. Tincher:

"Q. Also a branch at Memphis, is that the same category?

"A. No, no, I am talking about our retail store. Now, in itself, it can have other retail outlets in the Cleveland area. You have a Cleveland store that has five other retail outlets. This is for distribution, developing a distribution. Now, this is all retail.

856 Now, we are not developing subdealers throughout there, we are developing this type of distribution.

"Q. Branch stores?

"A. Yes, retail.

"Q. That might be the basis, then, for your misunderstanding of the question.

Are you aware that in your organization in some cities, at least, company-owned stores will supply tires for resale purposes to subdealers such as small service stations or small independent grocers who will sell tires and also have a filling station?

"A. This area I could be aware of to a degree. Again, our program in the area you are talking about, and I am talking about our program that I know of, is not in the area of the retail store. When you are talking about the gas station, this is another area where we are talking about selling to oil companies and getting that oil company account, and not on the basis of what you are saying.

"Q. Do you know whether or not the stipulation I outlined exists in your organization?

"A. It could exist, but I also know that is not a profitable deal and it is not a volume of business, nohow.

857 I know in the sales programs that I know of, and I am not an expert on sales by any means, but that I know of in our areas, I know this is not a development program at all.

"Q. By that, you mean it is not extensive and not encouraged by the company?

"A. On the basis that I know our program, the oil companies are on an oil company basis for a large amount of oil stations, and when you talk about our store here right in Akron going down to the corner gas station and doing business with him, I don't think we even go after it. It is not profitable on that basis. It can't be. Therefore, that program, I know, wouldn't work.

I say, I am not a sales expert, but I do know areas that might be profitable and might not, and these areas are not profitable.

It is very poor distribution, if I might say so, only on a—but on a level of a group of gas stations, this is something else, and this is home office business that we would be after.

"Q. Could you give us a general listing of the products of General Tire and Rubber Company which are supplied to various independent dealers, such as Steepleton
858 General Tire Company, at Memphis?

"A. Yes, sir. I would say the categories of supply are tires, tubes, repair materials. This is the basic supply.

Now, when we have gotten into the business of gas stations, which I referred to previously, we carry a supply of inventory on the basis of supplying large groups. Some of that material is available to our stores and so forth, but basically, this is what you call a TBA program, tires, batteries, and accessories. We do carry this line, but our basis is to supply Sun Oil Company, or some such thing as this.

"Q. I see.

"A. Our supplies are tires, tubes, and battery materials, repair materials. This is basic.

"Q. Repair accessories would include camel back and retreading supplies?

"A. Yes, and patches.

"Q. Pardon?

"A. Patches, belts.

"Q. Are you aware that Steepleton General Tire Company at Memphis makes some sales of tires and tubes for resale purposes?

"A. I couldn't say that I am aware, no, sir.

859 "Q. Would you assume that that is true from your knowledge of the type of operation he has?

"A. I am not familiar with his operation.

"Q. Do you know whether General Tire Company has any other independent dealer located in Memphis?

"A. No, I don't.

"Q. Does the company have a company-owned store in Memphis?

"A. No, sir.

"Q. Where would be the closest company-owned store to Memphis?

"A. I don't know which is closer, Nashville or Chattanooga. We have stores in either of them places, or it could be—I would have to take a map, it could be Atlanta, Georgia; I don't know the proximity.

"Q. Do you have any in Arkansas or Mississippi?

"A. We have in Jackson, Mississippi, a store. I am guessing that that is still a store in Jackson.

"Q. Does General Tire and Rubber Company distribute at wholesale tires, tubes, and repair materials from its Memphis warehouse to individuals or to—I mean individually operated businesses or small accounts in the Memphis area?

860 "A. I wouldn't be familiar with it unless there was—if there is some equipment manufacturers there I think of a boat trailer outfit or some such thing like that, then I would say yes they could, but I am not that familiar with the local level of the Memphis branch. You see, if you get into a branch area from my standpoint, we would be concerned with taking inventory in that, that would be our big area.

"Q. Does General Tire and Rubber Company have salesmen working out of the district office in Memphis, going out to make sales to various accounts?

"A. I don't think that—they don't classify them as salesmen. They classify these fellows as territory managers.

"Q. What activities does the territory manager have in reference to making sales?

"A. Well, he would—he is primarily interested in distribution, increasing distribution through the established distributors that we have, whether it would be company-owned or otherwise, and also getting new business.

"Q. Now, does he go out or does he have some salesman or representative in his office who goes out to work with a dealer in trying to build up sales or to sign up new accounts?

861 "A. Now, then you say does he go out, you are talking two different things here. You have got a district manager.

"Q. Yes.

"A. Under him you have the territory managers, each has a territory. These territory managers go out to develop business, yes.

"Q. Do you know who would be the territory manager for Memphis and particularly for the Steepleton General Tire Company?

"A. No, sir, I would not.

"Q. Does the territory manager actually in some cases go with the dealer to contact a potential account and try to work out terms?

"A. I would think so, but this is not my category. These duties I wouldn't be in a position to give you a very good answer.

"Q. Does General Tire and Rubber Company set up anything in the nature of quotas for its sales organization to meet or to work toward in the matter of sales?

"A. You are talking now of this territory man that we are talking about?

"Q. Yes.

862 "A. Yes, they do.

"Q. That would be based on an attempt to get a certain percentage of the market with reference to sales?

"A. It is based on a number of sales, and it is based on the policy which you would have to read. It is based on the type of sale, premium tire, regular tires. It is on a classification of passenger and truck tires. This is the way the quota is set up.

"Q. Is that quota, though, related to the number of registered vehicles, for example, in an area?

"A. No, I am fairly certain that that isn't so.

"Q. Could you give us a general idea of what percentage of General's sales are made through independent dealers as distinguished from the company-owned stores?

"A. I couldn't.

"Q. What division or branch of the General Tire organization, Mr. Zaveson, has responsibility for making these national fleet account sales?

"A. That, at the present time, comes under the truck tire managers, a subdivision of it.

"Q. Are there any national fleet account sales of equipment used in the contracting industry rather
863 than truck transportation industry?

"A. That I wouldn't know.

"Q. Does the company publish a list of its national fleet accounts, which list is distributed to its various independent dealers?

"A. I think that they do. That, again, would come under the truck tire sales department.

"Q. Now, with reference to the national fleet accounts, is the independent dealer expected to provide for the customer whatever tires and services that go with the account in his particular area as the customer orders the product?

"A. Yes, sir.

"Q. And is it true that generally there is some service

involved other than the delivery of the tire and tube or the product?

"A. Yes, sir.

"Q. What would that service include?

"A. I would say that it can be mounting and balancing if it is tires that they want, that they would mount and balance them.

864 "Q. All right. Would it include accepting used tires as a trade-in, in connection with the transaction?

"A. Gee, this I don't know. I don't think so, but I would not know, on the trade-in area.

"Q. Do you know whether it could include periodic examination of the tires for defects, for unusual wear, and interchange of the tires from one wheel to another wheel?

"A. I don't think, unless it was specified, because in these—in the area of adjustment, it might be referred back in to one of our divisions, or it would be operated through our control division office. I talked about a service sales manager and an adjuster, and it would work through this area when you talk about this kind of a deal.

"Q. I see.

"A. The adjustment—he might rotate tires, I would say, he might do that.

"Q. Would it be true that the services that go along with supplying the tires and tubes from time to time might vary as between different accounts?

"A. I suppose so.

"Q. Now, how is Steepleton General Tire Company compensated for providing this service to the national fleet accounts of General Tire Company?

865 "A. Well, as I previously stated, they—if it is the case—and this is an easy example—if it is a case

of putting four tires on a fleet account, they would withdraw tires from their inventory and mount them on this vehicle. They would report this mounting of four tires to the home office in Akron; Akron would replenish their stock of four tires and pass to them some form of credit the amount of the service that was rendered in this case to them.

"Q. How is that amount of service determined, Mr. Zaveson?

"A. This, I am not familiar with, not familiar with the details.

"Q. Certain percentage of the price of the tire, isn't it?

"A. This I don't know. I know very definitely that the tires are replaced to the local area and the billing is made out of the home office. As to the details, now, of the service, this I am not familiar with.

"Q. Does your independent dealer order his tires from General Tire Company on consignment, or does he order them and make payment for the inventory?

"A. He could be either, or he could be combination, depending on his local—his and our credit departments in connection with how good the fellow's credit is.
866 We have some people on consignment, some almost entirely consignment, and some a mixture, and some——

"Q. Do you know which category Steepleton General Tire Company falls in?

"A. I wouldn't know without checking the records.

"Q. Now, you stated that after the dealer supplies tires to the national account that his stock is replenished to the extent that he used it for that purpose.

Do you know whether General Tire makes a separate shipment of specific items that he removes from his stock to put on the equipment of your national account?

"A. It could be specific.

"Q. At other times, it might simply be giving him credit for that number and type of tire, or the amount that he had paid?

"A. Basically, from what to my knowledge, it is a replacement of the tires.

"Q. Have you dealt specifically with that area so that you can testify specifically that that is the practice?

"A. No.

"Q. And you are not familiar with the basis on
867 which your dealer is paid for the services he renders in supplying tires to your national account?

"A. That is correct.

"Q. Do you know whether your independent dealer has the option of servicing a national account in his area or not servicing it?

"A. Gee, I have heard of cases where maybe a guy didn't want to, through lack of knowledge of the national account, you see. This I have heard of, and this is on a complaint basis which I have knowledge about, but not on a specific basis, you see.

"Q. Do you know whether he expressed a desire not to service the account, he was told that it would be perfectly all right, he wouldn't be expected to service it?

"A. You are going beyond what I know. I just said that I have heard of such a thing.

"Q. Do any of your store managers ever raise that question?

"A. Gee, I don't know. I don't know.

"Q. Do you know whether the reimbursement that the company gives them for providing this service is equivalent to a similar sale and service to some fleet account which he has obtained himself?

868 "A. The fleet account is an entirely different thing.

"Q. Yes, I know it is, but it is similar, isn't it?

A fleet account which your store manager might sell and a national account which he might service in his particular area?

"A. I don't think so.

"Q. You don't think they are similar?

"A. No.

"Q. Let's go into that a little bit. I will assume that this will be a typical operation and you correct me if I am wrong, that one of your store managers will have a fleet account whereby he supplies truck tires to a wholesaler in his area. This wholesaler operates some 15 trucks. Would that be a typical fleet account for one of your stores?

"A. Yes. Now, this guy is just a local, he has got 15 trucks, and he is selling hardware and he has got these 15 trucks.

"Q. Yes.

"A. Yes, all right.

"Q. Now, in this same area, your store manager is asked to service 15 trucks which are operated in that area by Continental Baking Company, for example. Would those trucks normally be expected to require about the same number of tires and the same amount of servicing
869 in a given period of time?

"A. Well, the difference, the difference that is running in my mind could be on a national account basis. It might be in many cases just a matter of supplying tires, where on the fleet basis, he is a customer that is a little bit different to my way of thinking, to this kind locally that operates on the other basis. The national guy, to me, he just supplies the tires basically, I would say.

"Q. Wouldn't it be correct, though, to say that if this national account, for example, is a bakery which is operating a fleet of trucks in the area to distribute its products, that it would require of your store operator, your

store manager, essentially the same products and the same servicing that his fleet account would?

"A. No, I would say no. You see, there is a different advantage to the dealer on the fleet guy than there is on the national guy. There is no advantage to him on this national guy because this is a home office deal.

On the local guy, the fleet guy, there is an advantage to him, a distinct advantage to him.

"Q. Aside from the profit he makes from the transaction?

"A. I think so, yes, because he is dealing right
870 direct with that guy. That is his guy. That national guy is not his. It is a home office deal. There is a lot of difference there.

"Q. Isn't the home office interested, though, in seeing that the national account gets satisfactory service at the local level?

"A. I would say so, but maybe on a little bit different basis again. It would refer to much the same way as a gas station operator peddling tires against a dealer peddling tires. That gas station operator is peddling gas, and he might peddle a tire here occasionally, but he has got a profit there, sure, but I think there is a lot of difference between handling a fleet operator. Again, I am not a salesman, but I can certainly see these area and say there is a real difference to me, and I am not quoting from the standpoint of being sales, but I only can see that, being familiar with the tire business.

"Q. Does your tire dealer know the price at which the tires are being sold to the national accounts?

"A. No, sir.

"Q. Would General Tire Company tell him if he asked?

"A. I am not in a position to know whether they
871 would or not. I kind of doubt it.

"Q. Are those sales by General Tire Company to

the national fleet accounts considered by you and your company as retail sales?

"A. No.

"Q. They are considered as wholesale sales?

"A. I would say, and I would have to—I am trying to think in my mind, the billing in Akron as to our sales classification on our books that the sales are reported on our books and we are a wholesaler. That is why I say no. It is a sale recorded on our books, so therefore I would say it would be a wholesale sale.

"Q. And do you know whether retail sales tax is paid by the national fleet account purchaser on such tires when they are delivered and placed on his vehicles in a state where retail sales tax is levied?

"A. I would say that the sales tax is properly handled, and the reason I say it is properly handled is because our billing department in Akron is aware of the taxations in all states, through the fact that we have a Taxation Department that keeps them current. Therefore, they would know how to handle this.

872 "Q. You don't know how it is handled?

"A. No, this is a detail. I only know from a control standpoint. My job as an auditor in the home office is to see that there are certain areas of control. We know this control exists in the Billing Department.

"Q. Can you state whether or not General Tire Company makes any sales of tires through its sales division which are considered as retail sales?

"A. I would say no.

"Q. Does General Tire Company, through its sales division, make any sales of recapped tires?

"A. Let's qualify one thing here. When we say General Tire Sales Division, we are talking about now the home office as the manufacturing unit and not as part of the store here?

"Q. That is correct, yes.

"A. All right, then, I say no, there is no retail.

"Q. Yes. I am referring to any sales which General Tire Company might make, if it does make such sales, other than through dealers and its own stores?

"A. That is wholesale.

873 "Q. Does General Tire Company make any sales of recapped tires on a national fleet account basis, or otherwise than through its own company stores or its dealers?

"A. No.

"Q. Are any sales of recapped tires made through national fleet accounts, by the company?

"A. I wouldn't be aware if they are.

"Q. So far as you know, all the national fleet account sales are of new products?

"A. No, I wouldn't know either way is what I am trying to tell you.

"Q. All right.

"A. You see, I might say this: From the standpoint of our cap shops that we have located there, that you have there, we haven't been in the business of producing a lot of capped tires to wholesalers.

Now, lately we have increased a little bit there on the basis of keeping them shops busy when they are not busy working on customer dealer capping.

"Q. And are your recapping shops now supplying recapped tires to independent dealers as well as to some of the company stores?

874 "A. Yes.

"Q. Now, you said that General Tire doesn't treat this transaction whereby Steepleton Tire Company at Memphis supplies tires to a national account as a sale. Is that correct?

"A. No.

"Q. Is it not?

"A. General Tire, as a manufacturer, that is a sale that we made.

"Q. You have made a sale?

"A. To a fleet account.

"Q. And the transaction——

Mr. Mitchell: Correction. Did you mean to say a national account?

The Witness: Yes, national account.

Mr. Mitchell: We have used the term here and I don't want to have the record confused.

By Mr. Tincher:

"Q. When is that sale completed, Mr. Zaveson?

"A. That sale is completed at such time as the report is made by the store or dealer to our home office, and they produce the proper papers to make the billing and
875 replenish stock.

"Q. Wouldn't it be more correct to say that the sale is completed when the dealer delivers the tire, mounts it on the customer's truck?

"A. Well, this I don't know. I am talking about a piece of paper, now, that has dollars on it going to the customer and that comes out of our Billing Department, you see.

"Q. That is the billing?

"A. Yes.

"Q. For the product that was sold and delivered, isn't it?

"A. Yes.

"Q. But from your knowledge as an auditor, wouldn't you consider that the sale was completed, pursuant to this prior arrangment between General Tire and the customer

——

"A. Depends on the terms.

"Q. ——the sale completed when the product is delivered to the customer?

"A. It all depends on terms. You see, I think right away in my mind, we buy something and this comes up every year. Now, the terms are the sale, the terms involved depends on whether that is our possession or their possession, isn't it, or whether it is FOB shipping
876 point, or FOB delivery point. This is what is running through my mind. In some cases, as soon as that guy ships, it is ours. Sometimes it is not ours until it is in our location, you see. I don't know the terms here and I couldn't tell you, you see. I imagine this is the way you are asking me.

"Q. Yes, I am trying to get information.

Would it be correct to say that the typical national fleet account sale would be an arrangement—correction, strike that question.

Would it be correct to say that the typical national fleet account arrangment between your company and the customer would be an understanding that your company would supply that accounts needs in the various areas where it operates as those needs arise?

"A. I have never read the contracts involved, and therefore I would not be in a position to answer that on that basis.

"Q. Well, from your general knowledge of how it operates?

"A. My knowledge of operation is on the basis of what I have said, you see, of the replacement of the inventory, and the fact that the sale is not recorded here because, again, in my audit work, we are very watchful of
877 the fact that there is no sales recorded here, that they are home office sales. This is the area. When you get into the finer details of this thing, I am not familiar with it enough to give you an answer beyond what I am giving you.

"Q. Do you know enough about the way the national

accounts are handled to know that the customer does not agree to take a specific quantity of tires and tubes in any given period of time?

"A. I would assume that that might be so.

"Q. And that he really is arranging with the company for his needs, whatever they may be, to be supplied from time to time as the needs arise?

"A. It could be, but you see, there again, it is like anything else. When you are dealing with five guys here that I may deal with you in one manner and with him in another manner.

"Q. Yes.

"A. That kind of thing.

"Q. Do you know that in general the prices that are paid by your national fleet accounts per unit are less than the prices which your independent dealer is authorized to sell to his fleet accounts?

"A. I am not familiar with the price structure on
878 that basis.

"Q. Does General Tire publish manufacturers' suggested prices for its dealers?

"A. I am not familiar with that. You are talking about the company store?

"Q. Yes.

"A. He has a price list. This, very definitely I could say, he has a price list. The independent, that is another story.

"Q. Well, don't you know that the independent dealer has suggested price lists which are either the same or comparable to the price list furnished to your company stores?

"A. No, I couldn't say truthfully on a detail basis in that area.

"Q. Does General Tire Company, then, control the prices at which its store managers sell tires and tubes?

"A. No.

"Q. What would be the purpose, then, of the tire price lists which the company furnishes to its company-owned stores?

"A. The price of his inventory, for one thing, and he might—it is a basis for his sale of a certain markup of profit. He has got to know his cost. He has got to
879 have a base for the whole thing.

"Q. Yes. Then you would say the price list which the company furnishes to the company store are primarily for his use in knowing his costs?

"A. That is correct.

"Q. And he is at liberty to make his sales at prices of his own choosing?

"A. I would say in categories, I would say in the passenger line, basically, they have prices that are pretty well established. I would say in other areas, he has a leeway to work, especially in the premium line.

"A. All right, and my questions will refer to your company-owned stores' sales of tires and tubes?

"A. Yes.

"Q. Is the manager required to show on such sales, or to earn a specified profit?

"A. Well, he works—he works basically on an overall profit on here. This is the thing that we push at him pretty strongly, or the manager of the retail stores. If the picture here does not show a profit, then they go into the categories of where he is maybe not getting the right profit.

880 "Q. And you are referring to Exhibit No. 5 to your deposition?

"A. Oh, yes, 5.

"Q. So within limits of home office auditing of his profit and loss statement, he is free to set prices of tires and tubes at whatever level he chooses?

"A. Well, I would say yes, but not to the degree that you might get some hogwild guy, you see, that—boom—this Exhibit 5-a goes red altogether. We would get in there pretty fast and see what is wrong, or a territory manager might come in there and say, 'I think you are selling too low.'

Of course, you have advertising media that indicates certain prices on certain stuff, but there is a leeway there, yes.

"Q. Mr. Zaveson, are you aware that in some instances your store managers and independent dealers of General Tire Company will get approval from some General Tire Company representative for the sale of tires to a particular customer at a price which is less than the company charges that dealer or manager?

881 Mr. Mitchell: I hate to interrupt, but may we have the first part of that read back? I don't recall whether it related to the store run by the company and the independent dealer or not.

(Record read as requested.)

The Witness: I think if I understand it right, yes, this could happen; but not just from our representative. This would have to be from a specific individual, I would say, on a district level or management level of the home office.

By Mr. Tincher:

"Q. All right. When that is done, does the General Tire Company make a special adjustment for this dealer in order that he can carry through the transaction which has been approved and make a profit on the deal?

"A. What do you mean by special adjustment?

"Q. Lower his price, so that he, for that particular customer, will be paying less for the tires than he gets when——

"A. On a specific billing?

"Q. Yes.

"A. This could happen.

882 "Q. And does happen?

"A. Yes.

"Q. Is that, also, considered by you as a retail sale?

"A. Yes.

"Q. Even though——

"A. Wait a minute, hold it.

"Q. Explain your answer, I am sorry.

"A. I don't want to get confused here.

I assumed that you were talking on a wholesale level in what you were directing at me, so now you switch to retail and I am a little confused. When you talked of a special price, I was talking of a wholesale basis.

"Q. Yes, a special price to this particular dealer?

"A. Then you reverted to retail.

"Q. All right, now, I didn't call it retail. I am asking you whether you call it retail when the price to that particular customer, as approved by home office personnel, is less than this dealer's usual price?

"A. Well, it is still a retail sale.

"Q. In your opinion?

"A. Yes.

883 "Q. Do you know in that instance whether the dealer bills the customer or whether General Tire Company bills the customer?

"A. In the instance we are talking about, the dealer would bill the customer.

"Q. Suppose that customer is supplied out of the dealer's inventory, for which the dealer has paid a price greater than the customer's price, how would General Tire Company make the adjustment which would enable the dealer to profit from that transaction?

"A. Well, that is made on a claim basis, I would say, and that claim could come two ways. It could come as

a direct claim by the dealer, or on a form produced by the district manager.

"Q. Would such an adjustment be shown on the profit and loss balance sheet anywhere in this Exhibit No. 5 to your deposition?

"A. If he claimed it, he would use this spot right here, and I am talking about our retail store, if there is a claim.

"Q. Yes, sir. You designate that as Item 1204 under current liabilities?

884 "A. Yes, but let's say this is a specific item that could be in this claim.

"Q. Do you get in your department balance sheets and profit and loss statements from any of the company's independent dealers which are prepared on the same form that you have made here Exhibit 5 to your deposition?

"A. Not in my department.

"Q. What department would those profit and loss statements and balance sheets from independent dealers be filed?

"A. If they came in, if they came in in that form or maybe another form, they would basically go to the Credit Department.

"Q. Do you know whether some of the independent dealers do submit such balance sheets to the Credit Department of the Tire company?

"A. I would say yes, through their normal course of keeping track of the limitations of credit extended. This is a normal requirement in many cases.

"Q. Would you assume from your knowledge of the business that Steepleton General Tire Company would submit periodically such balance sheets?

"A. I would have no idea.

885 "Q. You wouldn't be in a position to assume one way or the other?

"A. No, I wouldn't be interested, in my area.

(Discussion off the record.)

By Mr. Tincher:

"Q. Are you familiar with the fact, Mr. Zaveson, that in various states a state price list is used in making sales to the state government and perhaps to county and city governments?

"A. I am familiar with the fact that there is possibly, yes, but I don't know whether that is on a local level or the level of the home office. This I am not sure.

"Q. But you are aware that in particular areas, such a price list is used by tire dealers in selling General tires?

"A. Well, I would have to revert back to stores.

"Q. Yes?

"A. And say that there could be, on a company-controlled store basis.

"Q. From your knowledge of that fact, can you state whether or not the price at which General Tire products are sold to the state and county and city governments is a price comparable to the price to subdealers?

886 "A. This I wouldn't know.

You see, when you get in the area of some of this pricing, we verify prices inventory-wise in our stores. When it gets to the point of sale and prices in relation to sales, sometimes we might not be interested unless they specifically say this price is lower and maybe you get into that area.

"Q. In other words, throughout your accounting procedures, you are not considering the prices at which any particular dealer or store manager is selling the product?

"A. To me, it is an auditor, you see. Accounting, it is something else, but me, auditor, not unless I am specifically requested to get into these areas.

"Q. Mr. Zaveson, would General Tire Company at its home office have records that would show all products

delivered by it to Steepleton Tire Company, for example, in 1960?

"A. Yes, sir.

"Q. And would it also have records showing all the products delivered by Steepleton Tire Company to national fleet accounts?

"A. It should, yes. I don't know how they file that stuff, but I am certain that this file would be on hand.

"Q. And those records would show, I presume, the items, quantities, dates, prices, and so forth?

887 "A. Yes.

"Q. Has General Tire Company made any study with reference to the margin between prices paid and prices charged by its dealers which will enable such dealers to make a profit in their business?

"A. I would assume that this is just a normal program that our Sales Department would have right along.

"Q. Now, would you know what the figure is with reference to General's independent dealers?

"A. No, sir.

"Q. Do you know what it is with reference to the company-owned stores?

"A. No, sir.

"Q. Could you give us an approximate figure?

"A. I don't think so because, again it is not—it is of no interest in my area unless specifically I go into analysis which is very seldom. The area doesn't usually concern me.

"Q. Have you prepared such analyses in the past?

"A. I don't recall.

"Q. Or had one under your supervision prepared?

"A. Not on that basis. We made an analysis of
888 of our Los Angeles, California, area at one time as to what was causing a lack of gross profit. I don't know just how that was broken down at the present

time, but I am pretty certain that we didn't go down and compare cost with selling and go right across and try to establish a percentage.

"Q. Do you know whether General Tire consigns any stock to contractors in the Memphis area for their use?

"A. I wouldn't without checking records. From a memory standpoint, I could not say.

"Q. Is that done in some areas, to your knowledge?

"A. Yes. I can think of a specific one at the time that they were building a large dam up around Hungry Horse and we consigned a large number of tires in that area.

Mr. Mitchell: For the record and because some of us are not so good at geography, could the witness state where Hungry Horse is?

The Witness: Up in Oregon, around that area, around the Snake area, up in the northwest.

By Mr. Tincher:

"Q. Was that a transaction handled directly by the General Tire and Rubber Company?

"A. No, it was handled by the dealer that had the
889 account, you see. Now, when you talk about consignments, then we, of course—that would be our tires until such time as the billing went through, he sold them to that person.

"Q. In other words, it was a transaction, then, that was being handled by the dealer?

"A. Yes.

"Q. Does your company normally have one particular salesman who will call on the dealers in an area?

"A. Well, as I stated before, he is a territory man.

"Q. A territory man?

"A. Territory manager.

"Q. Manager?

"A. Yes.

"Q. And you would assume, I suppose, that at any

particular time the same territory manager would be calling on the Steepleton Tire Company at Memphis?

"A. The same one?

"Q. Yes.

"A. As long as he is employed, I would imagine so.

"Q. Yes. Now, is he paid by General Tire Company on a commission basis?

"A. He is paid on a salary basis, and a bonus
890 arrangement that I previously indicated to you that has a direct connection with his expenses, too.

"Q. I see.

"A. This is not a commission, it is a bonus paid at the year end.

"Q. Is that territory manager authorized to work with the dealer in setting prices to be charged to a particular fleet account?

"A. As to setting prices, I don't know this. To my knowledge, the guy is to help the dealer develop business.

"Q. General Exhibit 2 to your Exhibit 1 refers to a five per cent commission which is allowed by General Tire to, I assume, its dealers for sales to subdealers. Is such commission allowed in addition to profit which the dealer would make on the sale to the subdealer?

"A. I would say yes, but you see usually the profit is less there, and this would be compensating for some of the profit.

"Q. Profit would be less than what?

"A. Well, he might sell at a lower price to his fellow and then get the commission on his to compensate him for the different that he would get on a normal retail sale.

"Q. Does your company have any stores that would
891 make sales, for example, to a taxicab company in the same location on a fleet account basis?

"A. Could.

* * * * * * *

"Q. Assume that one of your stores sells a lot of
892 new passenger automobile tires to a taxicab company with discounts from the list price, would you consider that to be a retail sale, Mr. Zaveson?

"A. As far as the records of the store are concerned, we discourage and don't enter into a deal of this type that you are bringing out here because when you talk about that type of a deal, we do not want our stores to enter into that type of deal.

There are a lot of ramifications to it. We are in that type of business in the home office with taxi accounts in New York, and we handle them on that basis. We discourage this type of business.

"Q. In other words, your company prefers to handle that on a national account basis?

"A. You are talking about specific cabs, yes, this is a real area. That is right.

"Q. And does your company have some taxicab companies in its national accounts?

"A. Not as a national account. We have taxicab accounts in Cleveland and we have the taxicab accounts in New York, handled by the company itself entirely, servicing and all. A dealer is not involved.

893 "Q. Do you know whether your company has any taxicab accounts in Memphis?

"A. No, sir, I do not know.

"Q. To the extent that your company makes a sale directly to the taxicab accounts, are those sales considered to be retail sales or wholesale sales?

"A. Mileage sales.

"Q. Mileage?

"A. We sell on a mileage basis, or rental basis.

"Q. All right. New tires as well as recapped tires?

"A. Well, it is new tires. We collect the recaps as often as we want to. It is nothing to them. They pay by mileage.

"Q. In other words, the arrangement permits General Tire Company to take a tire off and recap it and put it back on the taxicab?

"A. Sure.

"Q. Do you have a special name or category for that type of business?

"A. Mileage account that we have. We call that the taxi account. The fact is on that we even have a taxi tire.

Now, I am specifically in my mind thinking of our
894 taxi account in New York.

"Q. All right. Is it in a different category than the taxi accounts in other places?

"A. It is the only one I am familiar with.

"Q. In New York, is there a retail sales tax on items such as tires and tubes?

"A. No, again, I would say what I said before in relation to tax. This emanates from our tax division and our Billing Department. I wouldn't be familiar with it one way or another.

"Q. Is there any breakdown in your accounting practices with reference to the taxi accounts which would place them either in the category of retail sales, or wholesale sales?

"A. There again they are sales right out of the home office. Now, we have what we call a Mileage Department, a separate division within the company that creates mileage sales which are bus—would be bus on a mileage basis and taxis on a mileage basis, so therefore you have a category at the home office which I would say is a wholesale sale classified as mileage.

"Q. All right. Does General Tire Company itself make any sales to used car dealers?

"A. Manufacturing? You are talking about the manufacturing plant?

895 "Q. Yes.

"A. No.

"Q. Are there any other categories of sales, then, other than the sales to manufacturers of automobiles, sales to national accounts, sales to taxi accounts, and bus companies on a mileage basis, in other classifications of sales that are made direct from the General Tire Company?

"A. Sales to your dealers. You can get into a lot of classifications now when you are talking about sales. We could have sales on a basis of brands, private brands. We could have sales on a bulk basis.

"Q. Yes.

"A. But basically, the sales as you have indicated, there would be large categories.

"Q. On Exhibit No. 3 to your deposition, Mr. Zaveson, in the lower right hand portion of the page, there are certain letters, R. T. OC. NC., and so forth. Would you explain what each of those symbols are?

"A. I might not know all the symbols, but the reason for this is to classify how the customer came in, whether from a radio ad, TV, whether he is an old customer, whether he is a new customer, you see. It might be a newspaper ad. I don't know what the rest of this is,

896 but this is the reason for this.

Mr. Mitchell: May I interpolate? May the record show when the witness said "radio", I indicated the letter "R" and television, he pointed to "TV" and old customer, and so forth, so that we can have the answer responsive to the question.

By Mr. Tincher:

"Q. On Exhibit 4 to your deposition, Mr. Zaveson, there is a column numbered 645. Would you explain what the abbreviated words mean and how that column is used in your accounting procedures?

"A. Yes, that is a reserve for retreated business,

and in the capping business, you inspect the casing, and you assume that that casing is good and you cap that tire. You have a certain amount of risk involved in the capping of that tire, so we, in order to replace a tire if something goes wrong with it, we set up a certain amount of reserve ahead of time anticipating X amount of the tires might go bad.

If the experience shows low, we adjust off. If the experience shows greater, we adjust up. At the end of
897 the year, we wash off. That must be washed off.

I am talking about in relation to our retail store. That must be washed off at the end of the year and we start over on a new year.

"Q. Where on the accounting forms that you have made a part of your deposition would an independent dealer show the income from servicing of the company's national accounts?

"A. I don't know whether the independent would show.

"Q. Where would your company store manager show it?

"A. He would show it on the Exhibit 5-c, the category 'Other Income' at the bottom, under 'Commissions Earned.' All the way at the bottom.

Mr. Mitchell: Again for identification in the record, might I suggest that the witness mark on the copy, and we will duplicate the item or entry to which he refers?

The Witness: In the category 'Other Income' and the account number, and there is a number 8004, to identify it.

Mr. Mitchell: Will you just circle that please?

The Witness: Yes.

898 Mr. Tincher: All right.

By Mr. Tincher:

"Q. Are there any other items that the store manager could include in the same category?

"A. He could.

"Q. Would you give us some samples of what they might be?

"A. My thinking isn't that good as to just what it might be offhand, but there could be other areas of commission that he could have in here. This area is not a great—there isn't a great amount of activity in there on the national account basis.

"Q. Are there any other billing points used by General Tire Company, other than its home office at Akron?

"A. Just started some other billing points. At one time we had a great many billing points. We centralized. Now we are in the process of decentralizing.

"Q. Has a separate billing point yet been established for Memphis?

"A. No, sir.

Mr. Tincher: That is all the questions I have Mr. Zaveson.

899 **Redirect Examination,**

By Mr. Mitchell:

"Q. All right, sir. I would like as expeditiously as I can to clear up the distinctions that there may be between fleet account sales by a company store or an independent dealer and the delivery function or mounting functions of an independent store on a company account arrangement. Am I correct in thinking that a fleet account sale would be one made by the store manager or store personnel to a local purchaser?

"A. Yes.

"Q. And in that transaction, would the store manager or store salesman enter into the price and terms of sale with the purchaser?

"A. Yes, sir.

"Q. In connection with fleet account sales, is the billing

done and the collection from the purchaser both done at the local level, that is, the company store?

"A. Yes, sir.

"Q. In connection with sales to fleet accounts, does the store earn and report whatever its markup or profit may be based upon the difference between its cost and the price at which it sells the product to the fleet account?

900 "A. Report to who?

"Q. Well, on these accounting papers?

"A. Yes, it does, yes. In a normal transaction.

"Q. With a fleet account purchaser?

"A. Yes.

"Q. And if after the transaction some adjustment need be made by reason of a performance of the product, or whatever, would that arrangement in a fleet account sale be handled by the store manager or some personnel in the company store?

"A. Right.

"Q. With the purchaser directly?

"A. By that store. It is their account.

"Q. Now, then, if I may, sir, if I understand your testimony and these transactions directly, we may contrast that with the national account transaction on each of those things, and I would simply like to check it out, the terms of sale and the arrangements with regard to the national accounts are entered into at the home office level?

"A. That is correct.

"Q. The prices, the billing arrangement, the terms of sale those are all entered into by home office personnel?

"A. That is correct.

901 "Q. The billing is likewise done by the home office?

"A. Yes.

"Q. On a national account transaction?

"A. Yes.

"Q. With respect to deliveries at or by a company store

under a national account transaction, there is a replacement of inventory to the company store?

"A. Yes, sir.

"Q. And that is——

Mr. Tincher: I wish to object to the leading form of the question.

Mr. Mitchell: I recognize that your objection is perfectly valid. I was trying to move along a little bit. If not proper, I agree; but I think this is actually a resumé of his testimony and I am doing it so that my understanding on the record will be clear.

By Mr. Mitchell: "Q. In obedience to the objection, will you state if the same replacement of inventory, which you have just said does occur in connection with the national account transaction—does that same replacement occur with other fleet account transactions?

902

"A. No, I would say so.

"Q. And would you state, please, sir, whether or not what the company store receives out of a national account transaction is a profit measured by a markup on merchandise, as was the case with the fleet account, or is it a compensation for something else?

"A. Well, my understanding is that compensation for handling the account.

"Q. And by contrast with the adjustment such as may be made on a fleet account about which you have already testified, at what level is the adjustment made in regard to a national account?

"A. That is home office again.

"Q. Now, then, in part of your testimony on cross-examination, I was confused. The record, I think, may possibly be confused although you did, later, in answer to some questions, elaborate and explain in part what I am about to ask you; I think I am correct in construing your testimony to have been that as a matter of home office

policy, no effort is made and no emphasis is placed on sales by your company stores to subdealers. In the
903 vernacular, this is a sales area that is not pushed. Is that correct? Did I construe your testimony correctly in that regard?

"A. I had indicated, yes, in our company stores that the area that is pushed is the area of branches of this store rather than the area of subdealer.

"Q. Yes. Now, then, you were asked several questions with regard to whether sales that were made in the company stores to subdealers for resale by those subdealers were retail sales or not?

"A. I had only indicated to me it was all retail, as classified here.

"Q. Now, my question is: In making such an answer, are you taking your information from the frame of reference of your own knowledge of what kinds of sales are actually made by the retail store?

"A. That is right.

"Q. And do I understand your testimony to be that your knowledge of the facts as they actually exist is that your retail stores do not make such subdealer sales to any extent, or to any significant volume?

Mr. Tincher: I object here because the question appears to be leading and also to be immaterial. I realize
904 that counsel is attempting to summarize the witness's testimony, but I think the form of the question is objectionable.

Mr. Mitchell: I actually agree that it was leading and for the purposes already indicated.

By Mr. Mitchell:

"Q. Will you state, sir, what is the frame of reference of your answer; that is, are we talking about what actually happens in the company stores?

"A. Well, this is what I was driving at as to what we had on the company store level.

"Q. And based upon your knowledge of what actually is happening and is reported to you by the company stores, it is your opinion that their sales are retail, is that an accurate statement?

"A. I would say so.

"Q. Now, then, with regard to such sales as are made—strike that. I should predicate that.

Is there to a limited extent, if at all, any sales by your company stores to subdealers for resale by the subdealers?

"A. I would say yes.

905 "Q. Now, would you tell us, please, sir, if you can by reference to the exhibits to your deposition, what are the directions and what is the procedure followed with respect to the recording of such sales to subdealers as may be made?

"A. It refers right back, then, to what we said before in this original exhibit.

"Q. For the record, sir, is that what has been made Exhibit 1 to your deposition?

"A. Yes, sir.

"Q. All right.

"A. And the General Tire exhibit, General Exhibit No. 2, then we would go right back to what we had specifically previously said that we must be on record—the dealer must be on record with Akron, and that is for the—is supplied by the dealer himself and the purpose of it is to be able to obtain the difference in price or commission as indicated here from what he would be selling that guy to so that his profit would even off to be compensated much the same as it would be on any other retail sale that he makes.

"Q. Now, then, this billing instructions, which is General Exhibit No. 2, a part of Exhibit 1 to your deposition,

indicated that certain claims are to be made in
906 order for your company store to obtain the commission provided for by this billing instruction, and is that the basis on which your records distinguish such sale? That is, by reference to claims?

"A. Yes, sir, I would say so.

"Q. Now, then, I take it that these claim forms must be some additional document or writing, and by additional, I mean something that we have not introduced here this morning. The claim as such appears on some other record?

"A. Yes.

"Q. So that your accounting records with regard to these sales to the extent they may be made by your company stores to subdealers would be reflected in part as you have indicated and also reflected on separate claim forms pursuant to billing instructions, is that correct?

"A. I would say so, and again, this would refer to details within the Billing Department that I would not be entirely familiar with that portion of it.

Mr. Mitchell: I believe that is all I have, sir.

**Recross-Examination,**

By Mr. Tincher:

"Q. Mr. Zaveson, this sale by your company store
907 to a subdealer, is that supposed to be made at the same price the company store is able to purchase the product from your company?

"A. Not necessarily. He could bill that at a low profit and pick up the difference in his profit by the commission. He has got to permit this guy to make a little bit of profit.

"Q. Yes?

"A. And he is not going to at this point make the same profit. I am talking in a broad sense. This, again, would

be much on the basis of how much margin he would get. If it is a lower ball he is getting his difference back through this area.

"Q. All right, now, again, just for a minute, with reference to the national accounts, you stated that when one of your dealers services a national account, his inventory, then, is replaced?

"A. Yes.

"Q. But if I am not mistaken, you answered that question earlier by me when I asked you the question that you are not familiar with the procedure for replacing the inventory?

"A. No, that wasn't so. I said that basically the
908 inventory was replaced, and you asked me whether it could be in a form of a credit or a different size, and I said I wasn't familiar with that portion of it.

"Q. All right. You don't know, then, actually whether four tires of the specific size that are put on one of the national accounts is separately and distinctly replaced by General Tire Company for that dealer?

"A. I would not be able to say that here without getting into the detail of a record and seeing that record, remembering it to that degree.

"Q. Then you said if any adjustment has to be made with reference to that delivery of tires to your national account, the adjustment is made at the home office?

"A. No, I said it would be—if a tire blew out or something like that?

"Q. Yes.

"A. And therefore there would be an adjustment?

"Q. Yes.

"A. There would be at the local level of a service manager at that point, and I would say he would make that. If not, that dealer possibly could make it, but then it would be a claim back to us, it is still our account.

909 "Q. Then, if he had to replace the tire after three months' time, because of faulty tire or improper performance, he would do that and, as I understand it, the company then would arrange for the proper adjustment between itself and the national account?

"A. It is the company's account. You must understand that there would be various ways of doing it. You don't specifically say on certain things that ABC, this is what you do. I say it belongs to General Tire and Rubber Company home office. It would depend on the circumstances, the specific circumstances and what this guy and so forth, and what you would do in detail, you see. This is a tough thing for me to tell you.

"Q. And you try to make such adjustment as will keep the customer satisfied?

"A. The home office is directing this, yes.

"Q. Yes?

"A. This is the important thing to me, it is our baby.

"Q. All right now, in what way when such an adjustment is made does the company compensate the dealer for his part?

"A. Depends on what he did, depends on what he did, what performance he made.

910 "Q. Does he send a statement to General Tire Company in which he says, 'I performed a certain service on a certain day and my charge for that is two dollars'?

"A. Could be.

"Q. That is done?

"A. Could be.

"Q. Does General Tire Company accept his statement, or do they make their own evaluation and charge?

"A. Well, if there is a—again, if there is a service sales manager in the area, this would be our representation. It might be our district office made a representation. I

would say yes, we may question the dealer as to what kind of a service he performed down there. This would just be a normal, to me, transaction.

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913 **DEPOSITION OF RAYMOND L. DAVIS.**

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915 **"RAYMOND L. DAVIS,**

of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed and testified as follows:

**Direct Examination,**

By Mr. Mitchell:

"Q. Will you state your full name, please?

"A. Raymond L. Davis.

"Q. What is your home address, sir?

"A. 111 Kenridge Road, Akron, Ohio.

"Q. What is your employment?

"A. I am Manager of retail operations for Goodyear International Corporation.

"Q. Is that a division or subsidiary of the Goodyear Tire and Rubber Company?

"A. That is.

"Q. And does the Goodyear International have its home office in Akron, Ohio, as does the parent corporation?

"A. It does.

"Q. Would you give us the address of your office, please?

"A. 1144 East Market Street, Akron, Ohio.

"Q. What is your term of service as an employee of
916 the Goodyear Tire and Rubber Company, or one of its subsidiaries?

"A. Twenty-seven and one-half years.

"Q. And to facilitate it, since our computations some-

times are not too accurate, will you give us the year in which that employment began?

"A. I should have said 28 and a half years; I started July 1, 1933, up until the present time.

"Q. What was your first position with that company?

"A. Originally, I started as a trainee in the branch and the store operations in Kansas City, Missouri.

"Q. Is that store operation a retail store? That is, does it sell tires and other products of the stores in Kansas City?

"A. Yes, primarily a retail operation.

"Q. How long did you continue to work at that level for the Goodyear Tire and Rubber Company?

"A. Approximately nine months.

"Q. What was your next assignment or position?

"A. I was store office manager and depot branch office manager at Abilene, Texas.

"Q. And again, is that in connection with the serv-
917 ing of customers in the community of the store out of which you worked?

"A. Yes, it was. That was both a retail operation and as a separate operation, a depot branch.

"Q. For how long did that employment last?

"A. I was there approximately two years and one month.

"Q. Thereafter, to what position did you advance, sir?

"A. I was then moved to the Dallas Branch Office of Goodyear as chief clerk in the district.

"Q. And what, generally, did your duties consist of and what were your areas of work in that capacity?

"A. At that time I was involved in general branch operation and also the handling of the accounting functions, the—shall I say heading up the accounting functions of our retail stores in the Dallas District area.

"Q. And for how long did that last, sir?

"A. Approximately one year.

"Q. What was your next position or title with Goodyear Tire and Rubber Company?

"A. I was district operating manager at the Houston District of Goodyear.

"Q. Would you explain briefly what your duties in that position may have included?

918 "A. General control of the operating functions of the branch and also at that time supervision of retail stores and handling, managing the accounting for retail stores as well as for the district office.

"Q. For how long did you hold that position, sir?

"A. About a year and eight months.

"Q. Thereafter, what position did you hold?

"A. From there I was sent to Kansas City as field auditor in the Kansas City area, where I audited our own retail stores and our branch organizations, sometimes on dealer consignments, dealer work for a period of approximately five years.

"Q. And from Kansas City, where did you go?

"A. I went to Chicago from there as regional auditor for the North-Central Region which covered about seven states.

"Q. In connection with your audit duties in that position, did you continue to have some responsibility or control over your store accounting and store operations?

"A. Yes, I did. My work was auditing in both retail stores and in the district offices as well.

"Q. And for how long did you stay in the Chicago position, sir?

"A. I was there a year and three months.

919 "Q. And from there, what position did you take?

"A. From there, I came into the home office in Akron as staff auditor in charge of field auditing.

"Q. And would you state, sir, again in that position

what responsibility or duties you had with respect to the retail store operation or accounting?

"A. At that time, it was primarily not so much retail store for that period of time, it was the working out of our general organization plan of auditing, our procedures for auditing, the field directions for auditing, and more or less the general overall supervision of the 30 field auditors in the field.

"Q. And did these directions which you were working out and planning and systems of audit that you were devising in that system have to do, at least in part, with the auditing of retail stores?

"A. Yes, it did.

"Q. And what was your next position, I take it with the Akron office?

"A. From there, I transferred into the Retail Store Operating Department as a staff man, senior staff, and was on that position for approximately four and one-half years.

920 "Q. Now, from the term or classification or retail store operating staff man, I take it in context that that refers to directly the merchandising through the retail stores in your area?

"A. It does, Mr. Mitchell. It refers entirely to the operating end, comptrollers' end at that time, of our retail store operations which included the operating instructions, the devising of procedures, the opening of new stores, the closing of stores, personnel in the Operating Department, and various types of that work.

"Q. And since it was from the home office in Akron of your employer, I take it that your responsibility extended to the whole field of domestic operation?

"A. Yes, to our entire chain of stores.

"Q. And what position did you have after that?

"A. In January of 1950, I went to the Oklahoma City

District as store supervisor, in which position I was placed for approximately two and a half years.

"Q. And again that had directly to do with the managing and overseeing of retail stores in the area around your district?

921 "A. That is right. I supervised 12 stores in the Oklahoma City area from the standpoint of sales, operating, control.

"Q. And I take it that would have extended up to about 1952 and 1953, is that correct?

"A. Yes, about the middle of 1952.

"Q. And what position have you held since then with your company?

"A. I came back in in 1952 as assistant manager of the Retail Store Operating Department, which position I held until June 1, 1955.

"Q. And there, again, that had to do with the overall managing and control of retail stores throughout the United States for your employer?

"A. That is correct, very much the same type of work as when I was on staff work except that I was directing it more than doing the actual detail work.

"Q. After 1955, what have you done?

"A. January, 1955, I went to the Southwest Region at Dallas as regional manager which was a different category than our previous work which was operating entirely, and this was operations meaning control and merchandis-

922 ing functions in the stores.

"Q. And for how long did that position continue?

"A. I was there approximately two years.

"Q. Which brings us up to about 1957?

"A. Right.

"Q. Since 1957, what have you done, Mr. Davis?

"A. From 1957, I was assistant manager of the Opera-

tions Department of the Retail Stores Division, Goodyear Tire and Rubber Company, here in Akron.

"Q. Have you been in Akron, the home office, of your employer since 1957?

"A. I have, yes.

"Q. When did you switch over to the position you now have with regard to International?

"A. Yes, I switched over the first of June 1961, as manager of Retail Operations for International.

(The following note was attached to this deposition: "(2 places) Date of trsfr. to GIC was June **1961** (not 1960). Corrections by deponent. TM H.)"

"Q. In brief summary, then, Mr. Davis, would it be accurate to state during the whole course of your employment by Goodyear Tire and Rubber Company, up
923 until a date in June, 1961, your responsibilities and duties included in large part and for some of the time altogether the operations, management, control, and accounting of the retail stores of your employer?

"A. That is correct. Primarily to a large degree most of the time, but for a couple of or three years, to a degree, but always connected closely with retail.

"Q. Now, then, Mr. Davis, the lawsuit in which this deposition is being taken concerns a retail store, that is the store that serves customers in the area of Memphis, Tennessee, as the dealer or outlet of the General Tire and Rubber Company, so that the frame of reference for my questions is directed to such a store operation, and in respect to any questions I ask about sales or classifications of sales, I would like for you to exclude as inappropriate here such sales as may be made by a manufacturer to an automobile manufacturer, as for example your employer, Goodyear Tire and Rubber Company, to Ford Motor Company.

We are not concerned with that type of sale, and by the

same token we are not concerned with any sales in the international market. We are concerned with the
924 operation of a store in a community in the United States.

Mr. Tincher: May I interpose, Counsel?

Mr. Mitchell: Surely.

Mr. Tincher: And make this observation. The status of the store involved in this is in question whether it is a retail store or some other classification store. That is a legal question which is to be passed on by the Court and to the extent that counsel has stated that it is a retail store, I would want it understood that it does make what are recognized as retail sales, but it also makes other classes of sales which the Department of Labor insists do not fall into that category.

Mr. Mitchell: I did not mean to beg the question, sir; by retail operation, I meant it is a store which sells customers in a community—in the community in which it is located and does not in any event sell to a manufacturer of automobiles, nor does it engage in international sales, with both of which you are familiar.

The Witness: Yes.

925 By Mr. Mitchell:

"Q. And which I wish to exclude from the frame of reference in which my questions are based.

With regard, Mr. Davis, to sales that are made by one who does serve customers in his community, in the town, for instance, of what would be called a retail store, would you tell us, sir, how much sales are classified or what categories they fall into?

"A. Well, historically, in the tire business, the classification has been strictly two classifications as to the type of sale, that is, a dealer sale which is a sale for resale, and a so-called retail sale includes consumer sales of all types, regardless of the use to which the product is put

or the price at which it is sold or the quantity in which it is sold or the type of business as long as it is for consumption.

"Q. Now, then, let me be sure I understand this. You say in the industry and historically two categories of sales are recognized. The one is sales for resale which would mean the sales by one who operates a store to someone else who will resell the tire. Is that correct?

"A. Yes.

926 "Q. And you say that all other sales to consumers fall into the second category?

"A. Yes, sir.

"Q. And that a sale is considered to be a consumer sale so long as the purchaser of the tire is going to use it, is that correct?

"A. That is correct.

"Q. And that it matters not the quantity of tires purchased by the consumer or the price paid, the use to which the tires will be put. None of these things affect the fact that the sale to the consumer—to any consumer is all in the same classification?

"A. That is correct. As far as the industry is concerned, as far as we have always recognized it, it has always been a retail sale regardless of the use or the price or the quantity.

"Q. And has that classification of sales by your stores into just the two simple categories regularly and routinely been observed by your company throughout the course of your employment?

"A. It has throughout the course of my employment, since 1933.

927 "Q. Is it still recognized the same?

"A. It is still recognized.

"Q. And from your knowledge by reason of having been in the industry since 1933, can you state whether or

not the same classifications are regularly recognized by other components of the industry?

"A. I cannot state as an absolute authority. In my discussions with people representing the industry and others who have company stores, in my contact with Goodyear dealers over the period of years which has been fairly extensive, in my opinion, it is recognized throughout the industry as the criterion that a retail sale is a sale for consumption.

"Q. Now, then, sir, you are, I am sure by reason of your long experience with your employer, thoroughly familiar with the records and the systems that it uses for accounting purposes in regard to retail stores?

"A. Yes.

"Q. A number of those, I am sure, have been devised or corrected or checked by you as well as regularly used by you or used by those under your control over a period of years?

"A. Yes, sir, that is correct.

928 "Q. At my request, have you brought with you to this deposition examples of accounting forms or bulletins which illustrate——

"A. I have, yes.

"Q. ——the categories which you just described?

"A. Yes.

"Q. Now, then, Mr. Davis, you have produced a single sheet printed on both sides which bears at the upper left hand corner the caption 'Retail Operating Manual B-1A, 3-1-61,' and then the heading centered and in caps underlined, 'Customer Billing'.

I will ask you first, sir, if I construe this properly to be a sheet extracted from a manual that is promulgated and published by your employer, and that it covers or contains directions to bookkeepers or others who will

be concerned with the preparation of billing for customers?

"A. Yes, sir, this is the page from the manual which is given to all of the Goodyear Tire and Rubber Company retail stores, and has to do with the billing document and the various types of coding which designate the type of business and whether it is charge or cash and is
929 one page out of that complete manual which probably is most apropos to our present discussion.

Mr. Mitchell: I will ask that be marked as Exhibit 1 to Mr. Davis's deposition.

(The said document was marked as Deposition Exhibit No. 1, Witness Davis, by the Notary.)

By Mr. Mitchell:

"Q. Now, then, Mr. Davis, from the arrangement of the holes at the left edge of the paper for insertion to a looseleaf binder of some sort, I take it that the front page of that sheet is that which is headed 'Issue 6' at the upper right hand portion?

"A. That is correct.

"Q. And I take it that that printing and information which appears on the front part of this sheet is just general directions and instructions. It appears to be with regard to categories, marking, and itemizing of billing?

"A. That is true, the preparation of an invoice in a store and carrying a revision date of 3-1-61, which does not mean that the whole sheet was revised. It might be only one insignificant change some place in the sheet.

"Q. And is this the billing instruction that is in current use by the retail stores of your employer?

930 "A. This is the current instructions that are being used.

"Q. Would you designate for us, sir, and describe that part of this exhibit which carries out the definition which you have just stated, or the classification which you have

just stated, namely the breakdown of sales by your stores into two categories, those for resale or those to consumers?

"A. Frankly, this is very short and crisp and explicit in that connection. On Page B-1-A, the only reference to classification is the statement 'Put X in dealer or consumer block at the top of the invoice to designate the class of business'.

"Q. Now, then, sir, would you please just put a bracket or indication around that part of the exhibit to which you just referred?

"A. Yes.

"Q. And for the record and clarity, would you read that part to which you just referred?

"A. 'Retail and dealer invoice. Heading. Put an X in the dealer or consumer block at top of invoice to designate the class of business'.

"Q. Now, then, I take it that that direction or
931 instruction has reference to a mechanical or manual function which will be carried out by the salesman or clerk who makes the sale, and that this indication of an 'X' in a block refers to some part of the printed form used as the sales invoice in your company's retail stores?

"A. It refers to the block on the invoice which is for the purpose of informing the accounting office what type of sale it is for future accumulation and the instructions, of course, are to the person in the store who is making up the invoice.

"Q. And when, pursuant to the instruction which you have just described, a block, either dealer or consumer, is indicated on the top of the invoice—and I take it that is done at the retail store and coincident with the sale itself—is that same classification followed through consistently in the accounting records by the accounting officers of your employer?

"A. It carries all the way consistently throughout that

a sale so marked is a consumer sale and retail, in other words any type of consumer sale.

"Q. Have you at my request brought samples of invoices on which this type of designation would be executed?

"A. I have. You will notice the block right there
932 where it indicates the dealer or consumer.

Mr. Mitchell: I will ask that this be marked Exhibit 2 to your deposition, Mr. Davis.

(The said document was marked as Deposition Exhibit No. 2, Witness Davis, by the Notary.)

By Mr. Mitchell:

"Q. Now, Mr. Davis, we have had marked as Exhibit 2 to your deposition the sheet out of the invoice which is light green in color and is marked 'Region Accounting Copy', and I have extracted that from a set of invoices bound together with carbon inserts in quadruplicate. Do I understand correctly that the green copy of that set which we have marked is the one that stays and becomes part of the permanent records of your company?

"A. Yes, sir, that becomes a record, a permanent record—let me amend that. It would not be a permanent record. It is kept for a certain number of years by the regional accounting office, also, of course, there is a permanent file copy in the store for a certain number of years.

"Q. And does it indicate or does it contain the dealer and consumer block near the top of the invoice
933 which is to be checked or filled in by a clerk or bookkeeper in one of the Goodyear service stores pursuant to the direction to which you referred a moment ago on your Exhibit 1?

"A. It does.

"Q. And where is that, and would you bracket that on your Exhibit 2?

"A. Yes, sir, right here.

"Q. Now, you have bracketed two boxes in the upper left hand corner of your Exhibit 2, above one of which is written the number 1, and below that same 1 is written dealer; above the other of which is written the number 2, and below that box is written consumer?

"A. Yes.

"Q. Now, is that the single and sole classification of sales which is made at the store level with regard to every sale through the store?

"A. No, sir.

"Q. How is that designation used and what categories of sales does it cover?

"A. This designation here, 2, covers sales which are not time payment or installment sales. This type of invoice is used on sales to dealers and on sales to
934 consumers where a chattel mortgage or a conditional sales agreement is not taken and where the sale is not on an extended term basis. On those sales, we code them 3, which is simply an accounting code to designate that they are budget sales where we carry a separate statistical summarization on the P and L.

"Q. And the budget sales from what you have just said are sales, payment for which is to be made over a period of months or years?

"A. Yes.

"Q. Are they consumer sales or are they dealer sales in your category?

"A. They are consumer sales in all cases. Even if a dealer were to buy for his own consumption on budget terms, it would be billed on a budget invoice and considered as a retail sale.

"Q. Now, then, am I correct in thinking that all sales through the Goodyear stores would be categorized either as a dealer sale or a consumer sale on the type invoice you

have made Exhibit 2 to your testimony, or if the sale terms, the payment terms were to extend over a
935 period of months, a separate kind of invoice of installment sales contract and other such forms would be used for the only third category of sales?

"A. Yes, sir, that is true as of the present time.

"Q. Now, then, except for these installment sales contracts, are all other sales through the Goodyear stores reported and accounted for on Exhibit 2?

"A. All sales to store customers are either reported on this type of invoice or on the budget contract which I referred to as Code 3.

"Q. Right. And it would follow, then, that the two classifications shown on Exhibit 2 are the only two classifications recognized and used in your accounting records?

"A. Yes, sir, as a retail sale. We would possibly have deliveries through the store which are not store sales, and I want to make that clear, which would be deliveries to another store, perhaps, transferred to another store or a transfer to the district with the delivery being to a dealer of the parent district, but those would not enter into the store records as a store sale.

"Q. That would be a transshipment of inventory?

"A. Correct.

936 "Q. To another unit of your own employer's business?

"A. Correct.

"Q. And would not probably be a sale as such at all?

"A. Yes, sir, that is correct.

"Q. Very well, sir. What is the next step in the accounting procedures by your employer, Goodyear Tire and Rubber Company, with regard to sales made through its stores?

"A. These sales and all transactions in the store are summarized on a report called a B-50 Report which goes by the store—which is made by the store and goes into

the regional accounting office. The regional accounting office then summarizes all this information through IBM cards toward the production of sales reports and of the —what we call the store operating statement which is a summarization of the sales, current month, year to date, the gross profit, the inventory, the turnover, the expenditures made by the store, and a statistical section which picks up all types of dealer sales, all types of retail sales and all types of budget billing.

"Q. Now, you have referred to that which you have just opened before you headed 'Monthly Store Operating Statement'?

937 "A. Yes, sir.

"Q. I ask you if you will make that Deposition Exhibit 3 to your deposition, sir?

"A. Yes, sir.

(The said document was marked as Deposition Exhibit No. 3, Witness Davis, by the Notary.)

By Mr. Mitchell:

"Q. Now, then, sir, by reference to this monthly store operating statement which has been made Exhibit 3 to your deposition, would you state in brief, if possible, how the information with respect to a given sale which might have been entered on your Exhibit 3 is accumulated and presented on Exhibit 3, bearing in mind our interest in the categorizing of the sale rather than such information as the name of the purchaser or other data?

"A. I am not a machine accounting expert, so I can only say that these are put on cards, of course IBM cards, but essentially any type invoice which we have looked at here as Exhibit No. 2 will fall into either the dealer or the retail category, depending on whether it is a sale for resale or whether it is a sale for consumption in which case it becomes retail regardless of the price or the quan-

938 tity purchased or the use to which it is put.

The budget sales, then, the Code 3, on a separate

type invoice fall into the budget sales category on Line 3 of the operating statement for passenger tires which is merely the test program, more or less, to determine the relative margins available on the two types of business, that is straight retail as compared to budget.

(A note was attached to this deposition as follows: '3rd Par. 4th line should be—"All tires and tubes—Dealer, car, and home and other dealer billing and retail billing of tires & tubes M. A. & T. V. and other and separating—". Correction by deponent. T. M. II').

In addition to that, the billing from the store is then summarized statistically at the bottom section of the P and L from Lines 81 through 89, is further broken down by all tires and tubes—Dealer, car and home and other dealer billing, and retail billing of tire and tubes, MA and TV and other, and separating the budget billing of tires and tubes, major appliance, and other. This operating statement then shows the store the exact sales,
939 the exact gross profit on each of the categories from Lines 1 to 44 and, of course, the expenses incurred by the store resulting in a statement of net profit on Line 79.

"Q. And it appears from inspection of your Exhibit 3 that the same category—that the same use of two categories for sales made through Goodyear Stores is observed on that monthly store operating statement, namely, the sale is classified as the sale to dealer, which I take it from what you said means it is to someone for resale, or it is a retail sale which is to the one who will consume the product?

"A. That is correct. That is the sole test of the classification.

"Q. And again just for clarification, the reference in your testimony to budget which I see here sometimes abbreviated on your Exhibit No. 3 as BUD——

"A. Right.

"Q. Refers to the fact that the customer is to pay for that over a period of months or years?

"A. Yes, and that is, of course, a retail sale.

"Q. And from the operating statement which you have made Exhibit 3, from the way the information on it is presented, I take it that would refer to a particular store or a particular outlet and for a period of typically one month?

940 "A. That is correct. The store operating statement is made for a particular outlet for a period of a certain calendar month, and with the year to date, totals for the calendar year to date.

It also, of course, is consolidated by us as is a custom in all companies through machine accounting, various units.

"Q. Yes, and is this same form of operating statement used for each and every one of the stores or retail outlets operated by your Company?

"A. I——

"Q. By that, I mean, is the form used, one for each outlet?

"A. Yes, with any domestic company.

"Q. Now, then, I take it within the normal course of accounting, the information from all such monthly store operating statements is accumulated on an overall profit and loss statement or some such date?

"A. Yes.

"Q. And with regard to the accumulation onto the overall profit and loss statement for a period of time with respect to your Goodyear stores, in this same classification of sales into either retail or consumer consistently adhered to?

941 "A. Yes, sir, at all times it shows up as retail sales and dealer sales in every statement. It is simply a consolidation of the total of the individuals.

"Q. And——

"A. I might add that, of course, this is also—this tabulation also is made by the regional office for the purpose of paying sales tax, and that sales tax is charged and paid on all retail sales as we designate retail sales; that is, sales for consumption, regardless of the price or the use to which they are put or the quantity in which they are purchased.

"Q. And while I recognize that over a period of years there must have been some changes in the form or format of the accounting documents that you have introduced this morning, as a general thing, has this same classification of sales into dealer or consumer types been adhered to and followed by your company throughout the term of your employment by it?

"A. Since January 1, 1934, the essential characteristics have been the same. It has always been—while the forms have varied over the years, there has always been that same division between dealer and retail.

Mr. Mitchell: I believe that is all.

942 **Cross-Examination,**

By Mr. Tincher:

"Q. Mr. Davis, in your testimony you have referred to these stories where your products are sold, and I assume that these forms you have identified and made exhibits to your testimony are forms used in those stores?

"A. Yes, sir.

"Q. Is that correct?

"A. Yes, sir.

"Q. Now, are those stores which are operated by the Goodyear Tire and Rubber Company, under its management?

"A. Yes, sir.

"Q. In addition to those stores, do you have outlets for Goodyear's products where the store or outlet is operated by some independent dealer?

"A. Yes, sir, we have a great share of our distribution through independent dealer organizations.

"Q. Could you give us a rough breakdown of what percentage of your products are sold through company stores as distinguished from those stores operated by independent dealers?

"A. I could give you only an estimate right now. My estimate would be that roughly 70 per cent of our replacement sales are through dealers and approximately 30 per cent through company stores.

943 "Q. Among those dealers, do you have different classifications such as franchise dealers, associate dealers, and so forth?

"A. Yes, sir, we have the franchise dealers or the dealers through our franchise dealers would refer essentially, I think, to what we call direct dealers out of the district, whereas our associate dealers are those terms the smaller dealers who are sold by the key dealer, the franchised dealer, or by the company store if they are the distribution point in that particular area.

"Q. Would it be true that your franchise dealers, as a class, would you make a larger percentage of sales for resale than your associate dealers?

"A. Would you mind repeating that question?

"Q. Would it be true that as a general proposition your franchise dealers would make more sales for resale, a greater percentage of their sales for resale, than your associate dealer?

"A. No, sir, I don't think so.

"Q. Well, now, I understood you to say that your franchise dealers do supply some of the tires sold by your associate dealers, is that correct or not?

"A. Yes, sir, that is correct, but the associate dealer
944 is, generally speaking, a service station or a garage who is almost entirely retail sales, whereas, of course, the franchise dealer would have some percentage of wholesale sales, sales for resale, so that his percentage of retail sales would be somewhat less than the associate dealer.

* * * * * * * *

945 By Mr. Tincher:

"Q. Now, Mr. Davis, if you can answer this question, do you know of any franchise dealers which your company has who regularly sell 25 per cent or more of their gross sales for resale purposes?

"A. Yes, sir, I do. I don't know the dealers personally. I know that we have dealers, particularly in the eastern areas of the United States, where some of them actually more or less function as what we call TBA suppliers which means primarily distribution to associate dealers and to service stations.

"Q. Then perhaps even more than 50 per cent?

"A. Yes, sir.

"Q. Of that type of dealers sales would be for resale, is that correct?

"A. Yes, sir.

"Q. Are any of those dealers—do you have, rather, any company dealers, company stores who fall in that category?

"A. Do we have any company stores who would sell a greater percentage than 25 per cent of their sales as wholesale for resale?

"Q. Yes.

"A. Yes, we do.

946 "Q. And also independent dealers?

"A. Yes, sir.

"Q. Does your company keep a list of registered asso-

ciate dealers who are supplied by either company stores or independent franchise dealers?

"A. That is a question which I am not able to answer. It is within the realm of the wholesale region and I believe there is some record kept at district level but I could not give you an authoritative answer on that.

"Q. Does your company have a designated price at which franchise dealers are to sell tires to the registered dealers, associate dealers?

"A. There are about five categories of prices of—of dealer prices, and the price at which the franchise dealer or the store sells the associate dealer depends upon the volume of purchases that are made by the associate dealer. There is no suggested price for each individual dealer, only that the general classification of volume is given to determine the buying category.

"Q. All right, within those volume limits, is it true then, that your franchise dealers are required to sell at prices designated by your company?

947 "A. No, sir, the franchise dealer is free to sell at whatever level he wants to. Those are suggested prices.

"Q. Even to your company's registered associate dealers, is that correct?

"A. The—what you call the registered associate dealers would be a list only as supplied by that franchise dealer. In other words, we have no connection with that associate dealer who is supplied by the franchise dealer.

"Q. You have no associate dealers who have contracts or arrangements, purchase arrangements directly with your company?

"A. I don't know whether I exactly understand your question or not. Directly with our company would be only those who are sold through our Goodyear Service Stores which are a subsidiary of the company.

"Q. Well, in addition to your company stores, you have so-called independent franchise dealers?

"A. Yes.

"Q. As I understand it?

"A. Yes, sir.

"Q. And those independent franchise dealers generally have certain associate dealers?

948 "A. Yes, sir.

"Q. To whom they supply tires?

"A. Yes.

"Q. Now, my question is: Does the company have any contractural arrangement with those associate dealers or with any of them, to your knowledge?

"A. Not to my knowledge.

"Q. Can any company become as associate dealer in Goodyear tires simply by arranging to buy such tires from one of your franchise dealers for resale?

"A. I would assume they could. I don't think it would be wide open to them. The associate—the franchise dealer undoubtedly would want to establish his own measurements or requirements for that dealership, but if the man were eligible and his credit were good and the associate dealer thought he was a good source of business, I assume that most anyone, if they wanted to resell tires and met those requirements would be eligible.

"Q. Now, you say if he is eligible. Is the franchise dealer free to pass on the eligibility of the associate dealers that he would supply?

"A. I would think within normal reasonable limitations they would be, that is, if a man is in the type of

949 business that is recognized as being an associate dealer and he is, as I said, a legitimate dealer, one who didn't merely use that as a means to buy tires at a discount.

"Q. Are there any other limits?

"A. Well, that is a rather difficult question to answer. I don't—I have not, have never been very much in the dealer end of our business and I would say that primarily the use to which the tires are put, that is, whether they are going to be resold or whether they are for consumption would determine the franchise dealer's recognition of whether it was an associate dealer or whether it was a fleet account.

"Q. I take it, then, Mr. Davis, from your testimony that Goodyear does not set up any criteria for determining who qualifies as an associate dealer and does not limit the franchise dealers in their arrangement with various people for associate dealers?

"A. I would say that the only limitation there is the whole industry recognition that an associate dealer is a man who is buying tires for resale.

"Q. Would you know whether there is any restric-
950 tion as to whether that person has a license to engage in the sale of tires?

"A. That might be true in some states. I don't know all the state legal requirements, but normally, I don't think there is any license. In some cities, there is, of course, licenses required, I think.

"Q. I see.

"A. That would be rather after the fact probably, than before.

"Q. Now, does your company have in its usage the term 'fleet account'?

"A. Yes, sir.

"Q. Would you tell us what that refers to in your sales?

"A. Well, the simplest definition I could give would be an account that has probably five or more trucks that is entitled to a fleet owner's discount.

Of course, there are sizes of fleet accounts. The size of

the account would probably have some determination on the price.

"Q. Would it also include a company that would use five or more passenger cars, for example, by its salesmen?

"A. I don't know whether the category goes as low
951 as five passenger cars. There are fleet accounts who primarily have nothing but automobiles. Usually it is in larger quantity than that, however.

"Q. Do you know what that quantity is?

"A. No.

"Q. At which they get the first fleet owner discount on passenger vehicles?

"A. I couldn't answer that question.

"Q. Do you know whether, if there are at least ten passenger cars in the fleet account, that that company would be given a fleet owner's discount?

"A. They would be undoubtedly given a discount, whether it would be categorized as a fleet owners' discount, I don't think would follow in all cases.

"Q. Who determines the amount of discount that is to be given in the sale of tires for fleet accounts?

"A. For the fleet account normally the determination rests more or less upon competitive conditions.

"Q. That is the basis for it, but who determines that competitive conditions require such a discount?

"A. There are, frankly, no determinations of the fleet owners that are sold on the dealer's books or the store books as to the amount of discount. I think that would be more or less a bargaining between the fleet owner
952 and the individual dealer.

"Q. Now, are you saying, then, that the individual dealer determines the amount of discount that he will allow to the various fleet owners to whom he sells tires?

"A. In his area, yes, generally speaking.

"Q. Generally speaking, are there limits on his au-

thority, or to what extent does the Goodyear Company step in and either independently of the dealer or in working with him determine the amount of discount that would be allowed?

"A. There are certain accounts that are classified as national accounts which are merely a delivery function of the dealer, and where the billing is made by the home office of the Rubber Company or by the District Rubber Company, and on those accounts, there is a set price for those accounts, national accounts, all over the country.

"Q. Now, are the national accounts in a different category than the term 'fleet accounts' as used in your company?

"A. They are somewhat interchangeable, but there are certain accounts which are, because of their size, recognized, and because of their widespread operation in more than one market characterized as national accounts.

"Q. Does your company have any fleet account sales
953 which do not fall into the category of national accounts?

"A. Yes, it does. Excuse me, are you through with your question?

"Q. I intended to ask further, but your answer to that is that it does have, is that correct?

"A. No, sir, I would like to have the question repeated.

"Q. I will try to rephrase it, then.

Does the Goodyear Company make sales in a category determined fleet accounts which are different in category from the national accounts?

"A. Well, I am trying to think. In answering your question, it is beyond my realm, actually, but I would assume that there are some large contractor accounts which probably are by direct sale.

"Q. By direct sale, do you mean negotiated by the company, by Goodyear?

"A. Yes, sir.

"Q. In those instances, does the dealer bill such customer, or does Goodyear bill the customer?

"A. That will vary. Some cases, the billing will be by the dealer. Other cases, it will be by Goodyear.

"Q. Even when the price may have been negotiated by the company?

954 "A. Generally speaking, the price as negotiated would be with the cooperation and the consent of the individual dealer.

"Q. If the billing is done by the company in that instance, is the sale considered to be a sale by the dealer?

"A. If the dealer does the billing, then it would be a dealer sale. If the company does the billing, then it is simply a delivery arrangement by the dealer.

"Q. And you say that in some instances when it is a delivery arrangement, the dealer may have participated with the company representative in setting the price?

"A. Yes, sir.

"Q. In the national account sales, does the dealer deliver to the customer from general stock, or does he deliver from some segregated stock of tires and equipment?

"A. Generally speaking, from the general stock.

"Q. And does your independent dealer have his stock on inventory which he has purchased and for which he is charged, or does he have stock which is simply there on consignment from the company?

"A. Well, our dealers, of course, could be classed in categories. We have dealers on consigned stock,

955 and it would depend on whether they are on consigned stock or inventory basis.

"Q. You have franchised dealers in both those categories?

"A. Yes.

"Q. Do you have dealers who carry part of their stock as purchased inventory, and part on consignment?

"A. Yes, sir.

"Q. Could you explain how that arrangement works? Whether it is limited to certain categories of stock that would be on consignment, or just how it is set up?

"A. Normally the consigned stock is given to dealers under two—in our system, under two categories, one of which we would call a fixed consignment which is usually less than—isn't by particular units, but by dollar value, usually, less than a thousand dollars; where we might have dealers with a larger consignment, normally within a dollar limitation, so that the dealer might have in some cases practically all of his stock is consigned stock and the majority of cases, however, he would probably carry some stock of his own and would have consignment for a certain value.

"Q. With reference to independent franchise dealers, their sales of tires and tubes, do you know of any situation where they would have on consignment only the stock which would be used to supply the national accounts, but would have other stock in their purchased inventory for sale to other dealers and for retail?

956

"A. I have no knowledge of such.

"Q. We have been speaking of independent franchise dealers. Does your company have a standard franchise or dealer agreement which it executes with such dealers?

"A. Yes, sir.

"Q. Are all such agreements the same or do you have many different agreements and franchises in form, I mean, in substance?

"A. That question is somewhat out of my realm, but to the best of my knowledge, there is a somewhat standard

contract. I would assume that there might be a separate subagreement on a consigned account.

"Q. For these franchise dealers, do you have a recognized price list which is furnished to the dealer?

"A. Yes, sir.

"Q. Are all your franchised dealers furnished with the same price list?

957 "A. All franchise dealers do not necessarily buy on the same price list. They are furnished with retail price lists which show a code price. The franchise dealer, then, will buy at a certain discount from code depending on his volume classification.

"Q. Are all your franchise dealers furnished with the same code information to determine the prices they pay to Goodyear for their tires and the prices that are recommended to such dealers for their resale purposes?

"A. They are furnished with the same retail lists and which also show the code prices from which the discounts are based.

* * * * * * *

958 "Q. Would it be true, Mr. Davis, that according to the code price list used by a franchise dealer that sales to fleet accounts might be as low or lower than the sales to associate dealers for resale purposes?

"A. Yes, sir. It is not figured, generally, from the code list. It is usually a discount from list price. It is possible that it could be lower than the associate dealer price, of certain associate dealers.

959 "Q. Would the price that such fleet accounts pay be determined as a general rule by the volume of purchases, or by other considerations?

"A. I would say as a matter of opinion that the prices probably would be determined by the volume that the account buys and the competitive pricing situation; in

other words, what the price is being quoted by other tire dealers.

"Q. Now, when the competitive price situation arises, what does the franchise dealer do as a rule?

"A. Well, he attempts to meet that price if he thinks he can make any profit out of the sale. I will put it, the average franchise dealer would do that, not all of them.

"Q. All right. Suppose he finds a competitive situation where the price at which he buys the tires does not permit him to make a profit. Then, does he normally contact some representative of Goodyear and attempt to work out an adjustment of his purchase price for that particular customer in order that he can get the business?

"A. Well, that is a question that is somewhat beyond my realm of knowledge. I don't know whether there would be any attempt on the average dealer's part
960 or not. I think that normally they would attempt to keep that selling price within a scope where their net price, after all their discounts were taken into consideration, would render them some profit.

"Q. But in your various capacities in Oklahoma City, Dallas, other places where you have been working on a district level or regional level in retail division of Goodyear, haven't you had experience with dealers who had to arrange for some special price in order to meet competition with fleet customers?

"A. Yes, there have been instances where they have had—not to retail stores, particularly, but I know there are some cases where they have asked Goodyear for help in meeting the competitive situation.

"Q. And that is not an unusual situation, is it?

"A. I would say it was the exception rather than the rule.

"Q. Well, would it be correct to say that it happens frequently that a franchise dealer would, in the course

of a year's time, have several occasions when fleet owners would refer to prices that they could get from a competitor, which prices would be so low that the dealer would have to make some special arrangement with Good-
961 year in order to meet them and make a profit?

"A. Yes, there would be such instances.

"Q. Now, when those instances arise, who, by classification of job, would the dealer work with in trying to get that adjustment in price?

"A. With the Goodyear District Manager who in turn would have to have Akron approval.

"Q. Now, let's assume a situation where in working through the district manager and getting approval of the home office, this franchise dealer is able to meet the competitive price at a rate to the fleet owner which is either less than your franchise dealer's rate, or so little more than his price that he cannot carry through the transaction and make a profit, how does Goodyear adjust the price charged to that franchise dealer in order to permit him to carry through with this special arrangement?

"A. They would give him a reimbursement for his stock and give him a commission on the delivery.

"Q. Would the dealer do the billing in that instance, or would the company?

"A. The dealer would do the billing.

"Q. Except for the matter of billing, then, the
962 dealer is carrying on a transaction there which is essentially the same as the national account transaction, isn't he?

"A. Yes.

"Q. He is being reimbursed for the price he pays to Goodyear for the tires and is, in addition, paid a commission for handling the sale?

"A. That is correct, in those instances.

"Q. What commission does he get, Mr. Davis?

"A. That is a question I cannot give you an absolutely accurate answer on. It is either five per cent or seven and a half per cent and I think that may vary from time to time.

"Q. Do you know whether it has varied in the past?

"A. I am—I cannot give you a definite answer. I think there has been a variance of as much as two and a half per cent.

"Q. In other words, in times when you have been working on the district and regional level, you have known percentages of commissions given to dealers which ranged from five per cent to some figure up to perhaps seven or seven and a half per cent?

"A. That is correct.

963 "Q. Now, in instances where this competitive price has been set and the dealer is reimbursed for the stock delivered and is paid a commission, yet the dealer bills the customer, how is the payment of that account handled?

"A. The customer would pay the dealer.

"Q. Does the dealer, in turn, remit that payment to Goodyear?

"A. No, sir, only for his regular monthly statement.

"Q. But as I understood your answer, he has been reimbursed?

"A. Well, he would be reimbursed by a credit memo.

"Q. Isn't it true that in addition to that, he is receiving a payment of the full amount paid by this customer for the stock delivered?

"A. Well, you asked me a question there I would have to think through. If it were out of his stock, then there probably—or if Goodyear shipped it, there would be a billing to and a credit to the dealer which would simply depend on whether it was a credit or a credit invoice depending on whether Goodyear delivered the stock to him

or whether it was delivered by the dealer. In other words, the dealer winds up with a net of either—either through payment by the customer for the merchandise de-
964 livered plus a commission to Goodyear, or if Goodyear shipped the stock, then, anyway it would come out, whether he secures payment from the customer or whether there is a billing and credit by Goodyear, he would come out with his net commission.

"Q. In other words, if he receives payment directly from the customer, then Goodyear makes the necessary bookkeeping adjustment to result in reimbursement to the dealer for his purchase price of that stock plus whatever the commission is that is paid to him?

"A. Yes, in some cases if he delivered out of his own stock, the only reimbursement would be the adjustment which would result in him getting his commission.

"Q. I notice here on Line 4 of Exhibit 3 in your testimony the caption 'Miscellaneous Sales and Cost Adjustment.' Is that the line in which such adjustment as you have described would be entered?

"A. You are talking about a retail store now. Normally, I would have to stop and think whether that would come—that line as you see there varies, is carried only under passenger tires.

"Q. That is correct.

965 "A. And it is primarily to record the credit which comes to the store from what we call quantity lot shipments or quantity lot tube discounts, items of that nature where there is a quantity lot discount which is below the regular store cost, and if there were a credit for that type of delivery, I would assume that it would come under that, although I am not in the accounting end of it now and I couldn't answer you that with a hundred per cent guarantee that my answer is correct.

"Q. Does Goodyear have some such accounting record

for its franchise dealers as the one which has been made Exhibit No. 3 to your testimony?

"A. No, that would be the dealer's own—the dealer would keep his own profit and loss statement, and each would be of a different type. It would not necessarily follow the breakdown that we have in here as to the different departments and lines. I have seen different dealer statements and they will vary as to their character and to the type of breakdown which they have.

"Q. Does your company keep a ledger record for each of its franchise dealers which would reflect the orders received from the dealers, the prices at which the
966 orders are filled, and various adjustments, commissions that are paid, and information of that sort which is comparable to the information shown here on Exhibit 3 for your company-owned stock?

(The following note was attached to this deposition: "9th line—should read—'They would not have on a district basis—.' 'There would be merely the complete file—.' Deponent's correction, TM, II.")

"A. They would not have on a district basis such a profit and loss statement. There would be merely the complete file of credit invoices, memos, and dealers' statements.

"Q. Does the Goodyear Company have a wholesale division as well as a retail division in its organizational setup?

"A. The operating section of Goodyear is set up as a wholesale operating division and a retail stores division, and in addition there is a retail stores accounting division which comes under the comptrollers department. The general sales organization is set up on an overall basis.

"Q. And the general sales organization would then, I take it, keep records both with respect to retail sales and wholesale sale?

967 "A. They would have—yes, in the company profit and loss, they would have a record of the amount of the total sales that are retail sales. Beyond that, I couldn't tell you. I don't know how they break them down. I haven't seen a general company breakdown.

"Q. Do you know whether Goodyear treats its franchised dealer accounts as a part of the retail operations, or as a part of its wholesale division?

"A. Franchise dealers?

"Q. Yes.

"A. They would be a part of the wholesale division.

"Q. What division of Goodyear Company makes the sales that are termed national accounts?

"A. There is a division of Goodyear called the National Account Sales Department.

"Q. And does Goodyear treat all of those national account sales as retail sales?

"A. They would be considered as a consumer sale, a retail sale, yes.

"Q. For which the billing is made by the home office, I take it?

"A. The home office and in some cases by the district office.

968 "Q. Are you familiar enough with such billing to know whether state retail sales tax is added to the price that is charged to the customer on those national accounts?

"A. I can only—I cannot give you an accurate answer. I have never seen the billing, but it is my understanding that they are.

"Q. How is the federal excise tax figured on truck tires and passenger tires, Mr. Davis? Could you fill me in on that?

"A. I don't know exactly. I think it has to do with the

weight of the tire. You mean the basis for establishing the excise tax?

"Q. Yes.

"A. I assume it is based on the weight of the tire.

"Q. And the tax, then, for any particular type of tire would be determined by its weight, rather than by the price at which it is sold?

"A. I think so. The excise tax, shall we say, is standard, whatever price at which the merchandise is sold has no relation to the excise tax.

"Q. And is it correct that the manufacturer pays that federal excise tax to the federal government?

"A. Yes, sir.

969 "Q. And does your company issue instructions to its dealers as to how the excise tax shall be computed and collected by them?

"A. That is a question I can't answer. Not to my knowledge. It is shown on the price list.

"Q. From your acquaintance with the price lists that are sent out by Goodyear to your various franchise dealers, can you say whether there are more than one or several suggested wholesale prices for a particular type and grade of tire?

"A. I don't believe I understand your question.

"Q. Does the price list that is sent to the franchise dealer contain more than one suggested wholesale price?

"A. The price list—it is rather hard for me to answer that because I have been so much more in retail than I have been in wholesale, and probably someone in wholesale could adequately answer you. I believe that all dealers—I know that all dealers receive retail price lists which also show a code price designation. Whether or not they are furnished with what we call the BB prices, from BB-1 to BB-5 which are given to dealers, franchise dealers and associate dealers, I don't know, but I don't

believe they are. I think rather they are more or
970 less on the basis of the average—the average dealer billing is on a code price less a certain discount percentage from that code price which they know and which they have knowledge of, what the discounts are from this BB-1 to BB-5.

"Q. Will you explain what BB-1 to BB-5 is?

"A. Well, the BB-1 to BB-5 is simply a discount from code ranging from 20 per cent to 30 per cent.

"Q. What are the initials BB—what do they have reference to?

"A. Billing base, I believe.

"Q. Now, I believe I understood you to say that your dealers would know how the discount should be figured from the code. Would you explain how you would expect your dealers to know that?

(The following note was attached to this deposition: "Line 12 should read 'so we figure it would be 22 and a half percent off the code price'—not 'of the code price.' Deponent's correction, TM, II.")

"A. Well, there is a suggested range of volume for each one of those classifications, and depending on the size of the dealer, he would know the discounts which are at a higher price level than his own, and in calculat-
971 ing it, they simply would take the code price and say, 'This dealer is on BB-2,' so we figure it would be 22 and a half percent off the code price.

If you are a BB-3 dealer, they would figure 25 percent off the code price. That would be their basis for billing their associate dealers.

"Q. Then, so far as you know, the franchise dealers would simply use the suggested retail price list as a basis on which to compute the discounts which would be allowed to the various dealers?

"A. To the best of my knowledge, yes.

"Q. And would they also use that price list in computing the discounts to be allowed fleet operators who are customers of theirs?

"A. I don't think they would normally. I think the normal discount that they would calculate to the fleet account would be based on certain discounts from list price.

"Q. Would that be some different price list?

"A. No, that would be this retail price list that I am speaking of, only that it shows the retail price and it shows a code price.

"Q. And would you say that the dealer would use the retail price list rather than the code price?

972 "Q. And would you say that the dealer would use the retail price list rather than the code price?

"A. Normally in the tire industry, that is the pattern, a discount from list.

"Q. Is a franchised dealer authorized to discount from the code price to the fleet accounts?

"A. Yes. It is up to him. In other words, there is no price stabilization. The prices are suggested retail prices.

"Q. What are the code prices?

"A. The code prices simply represent a point at which a standard discount can be applied for use as billing basis for dealers. Both prices will vary depending on the product, that is the amount of discount from list. You would have a higher discount from list to code on a premium tire or your first-line tire than you would on tires which are lower grade, lower gross profit.

"Q. Is it normal for the franchise dealers to grant discounts which would vary on the basis of the quantity of tires purchased?

"A. I suppose there might be some cases that the

973 quantity would determine the discounts they would quote, yes. If there is a big sale of 200 tires as

opposed to five tires, I think the tendency would be to give a lower price. However, generally, it is more, I think, by the account itself and the annual volume which they anticipate, but I can't say an individual purchase would not influence it.

"Q. When you say it is determined more on the basis of the account itself, how would that enter into the price?

"A. By that I mean here is a man out here with 40 trucks and you know he is buying tires every year for 40 trucks and here is another fellow that has five trucks or three trucks. The tendency, I think, would be to arrive at a buying price for that larger account which probably would represent a lower buying price than the one with five trucks.

"Q. Even though any single transaction might be smaller than the transaction with the owner of the five trucks?

"A. Yes.

"Q. Now, I wish you would explain in a little more detail, Mr. Davis, the inventory transfer operation which takes place, as I understand it, in connection with delivery as to national accounts?

"A. Well, the inventory—are you talking now in
974 terms of the independent dealer or in terms of the store?

"Q. Yes, the independent dealer?

"A. Where the purchase order is given by the national account and it is an authorized national account, the dealer would make his billing for the tires delivered to the Goodyear district office, and he would be credited at his regular buying price plus a commission for the delivery.

"Q. Do you know what that commission is at the present time?

"A. I cannot give you an authoritative answer on that. I haven't reviewed that lately, and I don't know.

"Q. What was it the last time you knew?

"A. That is what I am trying to think. I believe that it is seven and a half per cent on tires and ten per cent on batteries as I last knew it, but I would not guarantee that that is the figure as of this present moment.

"Q. Is there any such arrangement as that which is in effect with reference to the retreading and recapping of trucks for national accounts?

"A. Largely the retreading for national accounts is on an individual billing basis by the store or dealer. There are, I think, only one or two accounts, to my knowledge, that have a national agreement on retreads.

975 "Q. In those instances where the billing is done by the home office for the retreads, is there a standard price which your independent dealer is allowed for such work, or just how——

"A. Where the billing is by the dealer.

"Q. No, where the billing is by the company.

"A. I think there is a standard price at which Goodyear bills them, yes. That I couldn't answer with complete accuracy because I am not absolutely familiar with it.

Mr. Tincher: I believe that is all.

Mr. Mitchell: I have a few questions, Mr. Davis, and we will try to let you get away from here.

**Redirect Examination,**

By Mr. Mitchell:

"Q. With regard to the categories of sales, you have already indicated that the delivery transaction or function at the store level on a national account would be considered a consumer sale, that is a retail sale as opposed to one for resale.

Could you tell us, sir, where the sale itself is actually

made in these national account transactions? That
976 is, who enters into the sales contract?

"A. On a national account, the sales contract would be entered into by our National Account Sales Division.

"Q. And then the delivery function, as you termed it, in an answer or two on cross-examination, which is performed at the store, the retail store level or the franchise dealer level, I take it it could be either one, the payment is made for this delivery function. Would you summarize just briefly what the function includes, that is, what is done at the store or dealer level?

"A. At the store or dealer level to a national account might fall into two categories, one of which would simply be a delivery to the account of the tires in question where those accounts don't maintain their own garage or their own place of service, or it could involve mounting the tires in the store or the dealer's place of business.

"Q. And I take it it is for that function, whichever it may be, by the dealer or the store that an allowance is made or a commission is paid by Goodyear?

"A. That is correct.

"Q. Now, then, sir, with regard to sales to fleet accounts to the extent that they are made at the store or dealer level, how are they categorized, as sales for
977 retail or consumer sales?

"A. They are consumer sales, and sales tax is charged.

"Q. In some of the questions on cross-examination, you indicate that in certain—I take it rather unusual situations—where your employer steps in and accommodates a dealer or a store in order to meet competition with regard to fleet account sales, you were asked whether or not in that arrangement was it similar to a national account sale? I would ask, if I may, for distinctions. Is that sale in that somewhat unusual situation made by

your home office personnel or made by the dealer to a fleet owner?

"A. It is made by the dealer.

"Q. And in that instance, does the customer pay the dealer, or does he pay on a direct billing basis to the home office?

"A. The customer would pay the dealer, unless they were a national account.

"Q. In those two particulars then, is it different from a national account, the typical national account transaction?

"A. It is different in those particulars, yes.

"Q. There was some discussion, I believe, at two places in your testimony about this BB-1 through BB-5 pricing quotation, and I wanted to be sure I understood
978 what was concerned there as well as clarify the record. Am I correct in thinking that this scheduling of prices which you identify as BB-1 through BB-5 are the prices which Goodyear suggests be used in transactions with an associate dealer or a subdealer or in any event, in a transaction where the sale is for resale?

"A. Yes, sir.

"Q. And so this BB-1 through BB-5 price listing would be the suggested prices to be charged by one of your stores or franchise dealers where it makes a sale to, say, a used car lot or a service station or some other business unit which will resell the Goodyear products?

"A. Yes, sir, that is correct.

"Q. Another retail price listing is suggested by your company which is used as the basis for the computation of all sales to consumers?

"A. Normally, that is true.

"Q. I wanted to be sure of that distinction.

Mr. Mitchell: I believe that is all I have.

979 **Recross-Examination,**

By Mr. Tincher:

"Q. Mr. Davis, in these deliveries made by a franchise dealer to a national account, how does the franchise dealer get the order for such delivery?

"A. To a national account?

"Q. Yes.

"A. It would normally just—let's put it this way. It would come to him because these accounts are set up as nationalized accounts and they probably would issue it to the Goodyear dealer or the general dealer or a dealer in the town where he is headquartered.

"Q. If he is a trucking company, for example, then the local terminal manager would pass the order to the franchise dealer, saying, "I need eight tires this week of a certain type and grade on this national account."

"A. Yes.

"Q. The order then comes directly to the dealer?

"A. Yes, and then he has to transmit that purchase order in with his billing to the Rubber Company, district or branch.

"Q. The particular tires which he delivers to that
980 terminal then, have not been sold by Goodyear prior to the day that the franchised dealer gets that particular order, is that correct?

"A. Yes. Normally, the franchise dealer would normally have those tires in stock.

"Q. I mean, though, the sale to the national account of those particular tires had not been made prior to the day the terminal manager calls him up and says he needs those eight tires?

"A. I would think that is correct in the majority of cases. I would assume there would be some solicitation, and by solicitation I mean at least the dealer or store

would keep in contact with the purchasing agent of that national account, since most national accounts are probably not only national accounts with one rubber company, but probably with all the companies.

"Q. In any of the district offices with which you have been connected or regional offices, have you had over-all supervision over the Memphis area in Tennessee?

"A. Only for one year, in 1955.

"Q. Was there in usage at that time a so-called state list price which was followed by the major tire com-
981 panies in supplying tires to the state government and various departments of the state government of Tennessee, and certain counties and cities in that state?

"A. I could not answer that with an unqualified yes. I would assume there were, since there are state price lists for practically every state.

"Q. And is it the general practice that such a state price list will carry the same price for various grades and types of tires, whether they are made by Goodyear or by Firestone, or Goodrich, for example?

"A. I couldn't answer that question. I know that we have a state price list, but whether that price list would be exactly the same as the other competitors, I don't know. I think there are cases in my knowledge where I am sure that there are other companies that have a lower state price list than we do.

"Q. How is the state price list arrived at by Goodyear Company.

"A. That is something that is entirely foreign to me. I don't know.

"Q. Could you say whether it is done at the home office level, rather than at the district office level?

982 "A. I would think it is done at the home office level.

"Q. Now, early in your testimony, you stated that it is your understanding that in the tire industry, only the

two classifications of sales are involved, namely, sales for resale and retail sales?

"A. Yes.

"Q. You are aware, are you not, that such a classification limited to those two categories has been questioned by the National Retail Tire Dealers and Recappers Association?

"A. No, I was not aware of that.

"Q. Are you acquainted with Mr. W. W. Marsh?

"A. No, I am not.

"Q. Have you had any dealings during your employment by Goodyear with representatives of the National Association of Tire Dealers and Recappers?

"A. No, sir.

"Q. Is it your answer, then, that you are not aware that any retail tire associations disagree with your position that all sales of tires and tubes can be grouped simply as sales for resale, or as retail sales?

"A. I was not aware of any difference of opinion, no.

* * * * * * *

985 **DEPOSITION OF E. A. HINDERSCHEID.**

* * * * * * *

987 **"E. A. HINDERSCHEID,**

of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed and testified as follows:

**Direct Examination,**

By Mr. Mitchell:

"Q. Will you state your full name, please?

"A. E. A. Hinderscheid.

"Q. What is your home address, sir?

"A. Today it is 250 Wayne Avenue. It will be changed Friday.

"Q. What has it been in the recent past?

"A. 250 Wayne Avenue.

"Q. Akron, Ohio?

"A. Yes.

"Q. What is your title and what is your employment at the present time?

"A. Trade Sales Division Operating Manager.

"Q. With what employer?

"A. The Firestone Tire and Rubber Company.

"Q. What is your business address?

"A. 1200 Firestone Parkway, Akron, Ohio.

988 "Q. Is that the home office of your employer?

"A. Yes.

"Q. How long have you held that title and that position?

"A. Six years.

"Q. For what period of time in all have you been employed by Firestone Tire and Rubber Company?

"A. Since September 1, 1935.

"Q. In what capacity did you start your employment with that company?

"A. A merchandise control clerk in our branch office in Cleveland.

"Q. For what period of time did you have that position?

"A. Approximately a year.

"Q. To what extent, sir, did your duties and responsibilities in that job have to do with the merchandising of Firestone products through its retail outlets?

"A. Only from a control standpoint.

"Q. And what was the next position you held with that employer?

"A. Store's cashier for approximately one year.

"Q. And in what location, sir?

"A. Cleveland.

989 "Q. And after that, what position did you pass on to?

"A. Store office and credit manager in the store that was then known as 1800 Euclid in Cleveland.

"Q. In this more nearly supervisory or executive position, did you have a broader responsibility with regard to the merchandising and control of merchandising through the store?

"A. Yes.

"Q. What was your next office?

"A. The next job was store accountant in Cleveland.

"Q. Did your scope and responsibility in that position have to do with a single store or with more than one?

"A. With all the stores in the Cleveland District, numbering some 13 or 14.

"Q. And for about what period of time did you hold that job?

"A. About a little over a year.

"Q. You have indicated that your title in that position was accountant. Did you have anything to do with the audit work of going to these stores to make investigations and examinations?

"A. Yes.

990 "Q. In the course of which, did you become familiar with the merchandising methods and practices, usages in the stores?

"A. Yes.

"Q. Thereafter, sir, what position did you administer?

"A. The next position was store's accountant in our Oklahoma City District, which numbered some 24 stores.

"Q. And was it similar to the job that you had before, except in a different area?

"A. The same job except more stores and more responsibility.

"Q. And thereafter, sir, what position did you attain?

"A. The next position was store's auditor.

"Q. At what location?

"A. I had the Akron and Cleveland territory.

"Q. And would you distinguish between the position of auditor which you now are describing and the position of accounting which he had before?

"A. The general difference was this: As the store's accountant, under my direct supervision, the profit and loss statements, balance sheets were prepared of the stores in the respective district, in the City of Cleveland.

As a Firestone auditor, I audited the books, so to
991 speak, to make sure that the assets as shown by the Accounting Department were correct.

"Q. And over what period of time did you hold this position with the title auditor?

"A. This was approximately two years.

"Q. And thereafter, sir, what was your job?

"A. Thereafter it was division auditor.

"Q. At what location, sir?

"A. My headquarters was in Akron, and I audited the branch offices in the Central Division, which is an area comprised of some eight or nine districts at that time.

"Q. Now, this use of the term 'branch office,' I believe for the first time in your testimony, will you describe briefly what that consists of?

"A. Branch office consists of a number of direct dealers in a geographical area, as well as a group of Firestone stores, the administration of which was in the branch office.

"Q. So that while at this point in your business career, you advanced to the branch office level and were still in the accounting part of your company's operation?

"A. Yes.

"Q. I take it your responsibilities and duties still
992 centered on the retail store or dealer operation?

"A. That is correct.

"Q. And it was those areas of merchandising with which you still had connection and over which you still had control?

"A. That is correct.

"Q. And then after the job at the branch level, what was your next title?

"A. The next position was operating assistant to eastern sales manager, headquarters in Akron.

"Q. And in connection with that position, did you leave the accounting discipline as your accounting specialty and engage in broader responsibilities?

"A. Broader responsibility, including accounting.

"Q. Accounting and what other general areas?

"A. Well, it is rather hard to describe all the duties that an operating assistant has to a sales manager, but it included a broad scope of not only control and accounting, but merchandising as well.

"Q. Again, directed solely to the retail merchandising level?

"A. Both stores and dealers, yes.

993 "Q. And thereafter, sir, what position?

"A. I held that position for two years and then I became operating assistant to the Vice President in charge of trade sales which was the—the other position was eastern sales manager which was half of the United States. The following position was with the Vice President in charge of sales which was all over the United States.

"Q. Now, then, you have used the term trade sales. Will you, for the record, indicate what you mean by that expression?

"A. Trade sales is to be differentiated from sales to manufacturers, which we call original equipment sales.

Trade sales has nothing to do with original equipment sales.

Trade sales would have to do with sales through stores, to dealers, both direct and associate, mileage account sales, sales to national accounts. That about covers it.

"Q. And I take it from your present title as the operating manager in charge of trade sales, you have advanced on up to your present level in the same end or department, perhaps, of your organization?

"A. That is correct.

"Q. Your duties, today, then extend to managerial
994 and control functions of these retail stores and dealers which are under the trade sales supervision, and would give us the scope or the geographic area of your present responsibility?

"A. United States.

"Q. During your experience for more than 25 years with the Firestone Tire and Rubber Company, have you become familiar, sir, with the classification of sales at the retail level and the usages and definitions respecting sales in the tire industry?

"A. Yes.

"Q. Will you state, sir, into how many categories sales by a company-owned store or a dealer in Firestone products, into how many categories its sales are placed or divided?

"A. I will have to divide that two ways. First, from a product classification, we have classifications from the standpoint of product, passenger tire sales, truck tire sales, tractor tire sales, retread sales, sales of major appliances, and so forth. That is the classification by product.

"Q. I see.

"A. As far as classification by customers is concerned, in Firestone stores, we have two.

995 "Q. And would you state what they are, sir?

"A. Consumer and dealer.

"Q. And would you state what is included within the dealer category of sales by your company stores or direct dealers in Firestone products?

"A. Any merchandise that is sold for resale.

"Q. And would you state what is included in the other category of sales which you have styled consumer sales?

"A. Everything else that we sell.

"Q. With respect to classifying a sale as a consumer sale according to Firestone's practices, is it of any consequence—strike that, please.

Does the character of the purchase play any part in the determination of whether or not it is a consumer sale?

"A. No.

"Q. Does the use to which the tires will be put by the purchaser play any part in determining whether or not the sale a consumer sale?

"A. No.

"Q. Does the quantity purchased or the frequency of the purchase by the same purchaser play any part in the determination of whether it is a consumer sale?

996 "A. No.

"Q. Does the price paid for the tire or other rubber company product play any part in the determination of whether or not it is a consumer sale?

"A. No.

"Q. I take it from what you have said that the sole distinction is whether or not it is a sale for resale?

"A. That is correct.

"Q. In the event that it is a sale for resale, you use the term dealer in Firestone terminology?

"A. Dealer.

"Q. And is there a synonym recognized by Firestone of retail, the same as consumer sale?

"A. Well, I would explain it this way: Dealer is a sale for resale. A consumer sale is a sale that is consumed by the consumer.

"Q. But my question is——

Mr. Tincher: May I interpose, Counsel, and again ask that you let the witness give his testimony in his own words. I think it is very important that we not suggest answers here because this is a matter on which the
997 Court will need all the help it can get.

By Mr. Mitchell:

"Q. Will you state, please, sir, whether or not the term 'retail sale' is used by Firestone in its records or in company parlance?

"A. Our accounting documents, as I said before, use 'consumer'.

"Q. Do you know whether or not, sir, that is synonymous with what is used by other companies and denominated retail sales?

Mr. Tincher: I object, unless proper predicate is laid for that question.

Mr. Mitchell: I think if you will permit the witness to answer, it will obviate the need for a predicate.

The Witness: Frankly, I am not sure what the other companies differentiation is on their store books because I have never seen a profit and loss statement of any of our competitors. I only know what our practice is for many years.

By Mr. Mitchell:

"Q. Now, then, sir, I will hand you a pamphlet
998 which is on its face 'Firestone Exhibits and Notes Pertaining Thereto on Retail and Wholesale Sales,' and I will ask you to look through this set of documents and tell me whether or not you can identify same as being records and the publications of your employer which were or are in current use for accounting or other purposes?

"A. This was a form we used back when I started with the company in 1935.

"Q. For the record, would you indicate, sir, that what you are referring to bears a 'A' as its identification in that pamphlet?

"A. Yes, at that time, we broke our sales down between dealer and consumer, and in those days, we had an additional classification whereby we broke down service sales. That was for the purposes of administration, to determine how much of the consumer sales were actually sales at a rather high gross profit.

"Q. If I may, sir, would you just to your own satisfaction leaf through that pamphlet to see whether or not you can identify it as exemplifying your company's record presently or past, and thereafter I would like to ask you some questions.

"A. I recognize all of these as Firestone operating statements, Firestone procedure, Firestone letters of detailed preparation of operating statements.

999 Mr. Mitchell: I will ask the Court Reporter, then, to mark that as Exhibit No. 1 to your deposition.

(The said document was marked as Deposition Exhibit No. 1, Witness Hinderscheid, by the Notary.)

Mr. Tincher: I will note an objection to the introduction of this compilation unless it is qualified more fully, I think, than the witness has done so far.

Mr. Mitchell: I appreciate your pointing it out at this time.

By Mr. Mitchell:

"Q. Mr. Hinderscheid, would you refer again to that which has been marked Exhibit 1 to your deposition. You have already indicated your familiarity with and recognition of those forms and bulletins and whatnot contained in that exhibit. Would you say whether or not all of these come from files or come from sources which you are

familiar with by reason of your experience in the several categories with Firestone that you have already testified about, and constitute documents which you have
1000 frequently used in the course of your employment with Firestone?

"A. Yes. By coincidence, here is my name who prepared this particular profit and loss statement on W. H. Baker who was then manager of our Columbus Fourth and Gay Store.

"Q. And would you indicate for the record that you are pointing out a record, a photostatic copy of which appears as Exhibit B in this pamphlet?

"A. Yes.

* * * * * * *

1001 "Q. Mr. Hinderscheid, do you know that this pamphlet which has now been identified as Exhibit 1 to your deposition, do you know whether or not it came from the files of your company?

"A. Yes.

"Q. In the course of having looked through it, are you prepared to state that those things that are in it are true copies, that is photostatic material, are true copies of documents, the originals of which appear in files available to you and under your custody as a Firestone operations manager?

"A. Yes.

"Q. Further, with regard to the typewritten comments that appear at various places in this exhibit, are you familiar at all with the nature and purpose of the preparation of the exhibit, including those comments?

1002 "A. I am very familiar.

"Q. Would you state what your knowledge of it is, sir?

"A. Well, this—any of these statements in here are

or represent profit and loss statements that are prepared every month on every Firestone store.

"Q. But I meant more specifically, sir, the typewritten comments which state certain facts about the operating statements, photostatic copies of which are appended. I would prefer not to have to go through and read and have you acknowledge or agree or disagree with each of these comments. I think I may be able to overcome adversary's objection by asking if you know the context and the arrangement and the reason for the preparation of that exhibit—not that particular page, but this pamphlet as such?

"A. I am not sure I totally understand the question, but I will say this, and I repeat that all of these—I am very familiar with these profit and loss statement forms over the years. Some of them individually here, I am even familiar with the men who were managers in those days.

"Q. Yes, sir.

"A. These are all documents that were taken from Firestone Tire and Rubber Company records.

1003 "Q. Right. My question is: Now, as to the typewritten material, not the accounting documents as such, but the typewritten material that appears at several places, either identifying or describing or stating certain facts about the photostatic copies, and my question is: Do you know for what purpose or in what way this pamphlet, the whole exhibit, was compiled or put together?

"A. This was used in some—I think this was used in some kind of evidence back in the middle fifties apparently to distinguish or attempt to distinguish between Firestone sales classifications between dealer and consumer.

"Q. And did that exhibit come from files or records of Firestone Tire and Rubber Company which are either permanently kept under your custody and supervision, or under the custody and supervision of those employees—

some employee who would make it available to you on request?

"A. Yes.

Mr. Tincher: I object to the question and move the answer be excluded.

If the witness saw it prepared, or if the exhibit was prepared under his direction, I think he could an-
1004 swer the question, but certainly the fact that it may or—that it may have been prepared from records under his supervision would not make him qualified to identify the exhibit.

Mr. Mitchell: I think you misunderstood my question and I will rephrase it or restate it because the witness may have misunderstood also.

By Mr. Mitchell:

"Q. I am not talking about the papers in this, but the exhibit in the binder?

"A. Yes.

"Q. Did this binder come from records of Firestone Tire and Rubber Company which are either kept under your personal or direct custody or control?

"A. The binder?

"Q. The exhibit as such, yes, sir, this document?

"A. Yes.

"Q. Now, then, sir, with regard to the explanatory material that appears and has a side index and a heading 'Firestone Exhibit,' that would seem to be nothing but an index of exhibits and I don't believe there is any controversy about that.

I will ask you to turn to a page which has typing on
1005 it and is the second sheet of this exhibit on which the statement is made, 'It will be noted from the following Firestone exhibits that Firestone uses consumer sales and also uses retail sales and that it uses such quoted terms interchangeably and synonymously' and I

will ask you to read or refer to the sheets of this exhibit subsequent to that statement and tell me whether or not you can agree with it, or whether or not you disagree with the statement I have just read?

"A. Yes, we use interchangeably retail or consumer, it doesn't make any difference. We differentiate between either of the two and dealer.

"Q. Now, then, sir, would you turn to the next sheet in the exhibit which has the side marginal identification A, and which is headed 'Store Operating Statement, August, 1935,' and I read a typed notation above it to this effect, 'It is to be noted that the only distinction between the various types of merchandise sales is between dealer and consumer. Consumer sales include sales to commercial accounts.' Now, I will ask you whether or not upon a review or upon your own knowledge of the type
1006 operating statement attached to that page whether or not you agree with that statement or disagree with it?

"A. Agree with it.

"Q. And does the accounting statement attached on the same page at the same place in this exhibit illustrate the statement above?

"A. Yes.

"Q. Now, then, sir, I will ask you to turn to the next sheet of the exhibit which has again the side index B and has the title Store Operating Statement, November, 1939, above which appears this in typing, 'It is to be noted that the only distinction between the various types of merchandise sales is between dealer and consumer, consumer sales including sales to commercial accounts?'

"A. That is correct.

"Q. And does the accounting statement which is photostated and appended to this exhibit at this place illustrate that statement?

"A. Yes.

"Q. Has it been marked, actually, so to do at column heading, namely, consumer and dealer?

"A. Yes.

"Q. I will ask you to turn to the next sheet of this
1007 exhibit which has a side marker C, and which is entitled Store Operating Statement, June, 1945, above which appears the following statement: 'The only distinction made in classifying sales is between consumer and dealer and the consumer sales include sales to commercial accounts.' At the bottom of the statement 'In the analysis of the salesman's performance, this same principle is followed classifying sales only between consumer and dealer, the commercial sales being included in the consumer figure.'

There is a column on this statement headed budget. 'The figures shown in this column are simply desired objectives or quotas.'

"A. Yes.

"Q. I will ask you to review the accounting statement at this place in this exhibit, and state whether or not you agree or disagree with the typed material above it?

"A. I agree.

"Q. Does, in fact, the accounting statement shown there make the distinction as stated?

"A. It does.

"Q. And is that consistent with Firestone practice in classifying sales by its stores or its dealers over the
1008 period of time during which you were employed by Firestone?

"A. It does.

"Q. I will ask you to turn to that which is marked D, and which is captioned Store Operating Statement, March, 1949, and refer to the typed material at the top as follows: 'The only distinction made in classifying sales is between

consumer and dealer and the consumer sales include sales to commercial accounts.' At the bottom of the statement, 'In the analysis of the salesman's performance this same principle is followed classifying sales only between consumer and dealer. The commercial sales are included in the consumer figure.'

There is a column on this statement headed 'Budget.' 'The figures shown in this column are simply desired objectives or quotas.'

I will ask you if you agree or disagree with that statement based upon a review of the accounting data attached?

"A. I agree.

"Q. Again, is this consistent with the practice regularly employed by Firestone with regard to its accounting for stores or retail dealers during the course of your
1009 employment by that company?

"A. Yes.

"Q. The statements so far A through D obviously referred to different periods of time. Will you state whether or not at the present time and during the interval after 1949 which is referred to on Exhibit D, your company, Firestone, has maintained this same consistent classification in regard to operating statements which may have been revised or whatever, down to date?

"A. Exactly the same.

"Q. On the next sheet of this exhibit is the explanatory statement under the caption 'Store Operating Statement Currently in Use.' The explanatory statement is, 'Again it will be noted that the sales are classified only between consumer sales and dealer sales. This is also true in analyzing the store salesman's performance on the reverse side of the statement. In both instances, the consumer sales figure includes sales to commercial accounts.'

I ask you to turn to the operating statement that appears

on two sheets and ask you if you agree with the facts I just read?

"A. I agree. This statement that we use today is
1010 somewhat different, but the breakdown between type of customer is still the same, consumer and dealer.

"Q. Fine, and is that indicated appropriately by an arrow and circle on the operating statement itself?

"A. It is.

"Q. Is it, again, indicated on the reverse side in respect to the part about the salesman's performance?

"A. It is.

"Q. To the next sheet in this exhibit, if you would, please, sir, I read as follows: 'Excerpts from store chart of accounts starting November 1, 1935, applicable excerpts from store chart of accounts for the fiscal year starting November 1, 1935, in which separate accounts are set up for classifying sales between consumer and dealer. Under these instructions, sales to commercial accounts were included in consumer sales.'

I will ask you to turn the page and review as necessary the chart of accounts on apparently four sheets and see if you agree with the facts I have just stated.

"A. I do.

"Q. And again following this which is headed Exhibit F, a chart of accounts attached following that ex-
1011 planatory statement, is it also marked by lines and arrows in appropriate places to which places specifically illustrate the statement I have just read?

"A. It does.

"Q. Now, then, sir, turning through to the page which has the letter 'G' as a side marker, and which is entitled 'Store Operating Letter, May, 1938,' and reading from that page, 'Applicable excerpts from this operating letter furnish instructions for recording the various types of sales. At this time, the same distinction between consumer

sales and dealer sales was retailed, but retail sales was used instead of consumer sales in this operating letter which, of course, is different from a chart of accounts, although not specifically spelled out except in the case of gasoline, all sales to commercial accounts were included in retail sales.'

I will ask you to turn the sheet and to examine the three sheets that follow it and see if you agree with the statement I have just read.

"A. I do.

"Q. And again on those three sheets, are certain parts of them enclosed in a box or indicated by arrows
1012 drawn on them to highlight the fact that those particular indicated parts illustrate the comment I have just read.

"A. They are.

"Q. And if you would turn to the sheet in that exhibit which has a side marker H, and which has on it and is entitled 'Excerpt from Chart of Accounts, Fiscal Year beginning November 1, 1942,' and has the following memo on it, 'This chart of accounts includes specific definitions of "consumer sales" and "dealer sales." These definitions have been repeated consistently every year since that date. This chart of accounts also provided for a breakdown between consumer sales and dealer sales on each side of the classifications. The accounts for truck tires and tubes should be carefully noted because a high percentage of such consumer sales are made to commercial accounts and emphasize that sales to commercial accounts were included in consumer sales.'

I will ask you to turn the page and to review the one sheet following and state whether or not you agree with the comments I have just read?

"A. I do.

"Q. And again are the particular pertinent parts in-

dicated by being enclosed in boxes and indicated by arrows?

1013 "A. They are.

Mr. Tincher: Counsel, I make no objection to any portion following that which the witness has just immediatey prior to this point identified because in going through it, I notice there is no reference to retail sales insofar as breakdown of consumer sales and dealer sales are concerned. There is no question as to the classification by this company or by this witness.

Mr. Mitchell: Well, I think just for consistent presentation and in part at least because of your early objection, I will just go on through it and get this witness's comment as to each of the memoranda or notes that appear in the exhibit.

By Mr. Mitchell:

"Q. I will ask you, therefore, to turn to the sheet of this pamphlet or exhibit which has the letter I at its right margin and which is headed 'Excerpt from District Operating Letter, October 1, 1945,' and which carries this notation, 'Applicable excerpts from an operating letter to district accounting stores covering accounting instructions for stores, primarily for sales analysis purposes.

1014 Please note that in 5 (e) the only sales breakdown required for stores is the classification between consumer sales and dealer sales. Although not spelled out, sales to commercial accounts are included in consumer sales,' and I will ask you to turn to the next sheet and indicate whether or not on review of it if you agree with that comment or notation about it?

"A. I do.

"Q. Again, is the particularly pertinent part indicated by an arrow?

"A. It is.

"Q. On the next sheet which has the letter J at the right margin and which is headed 'Excerpt from Current Chart of Store Accounts' and which bears this notation, 'This excerpt from current chart for stores shows the repetition of the definitions of "consumer sales" and "dealer sales" which definitions originally were spelled out in 1942. As had been done for more than 20 years, the current accounting system recognizes the distinction between "consumer sales" and "dealer sales" and includes sales to commercial accounts in "consumer sales".'

I will ask you if you will turn the page and look at the next sheet and tell me whether or not, on a review
1015 of it, you concur in and agree with the memorandum I have just read?

"A. I do.

"Q. Now, then, sir, the last sheet in the exhibit is headed Exhibit A and is styled 'Store Sales and Service Ticket,' and bears on it what I take to be a store invoice and has at the top this notation, 'This is a sample of the sales and service ticket in use at all company-owned stores and many dealer-operated stores. Substantially the same sales and service ticket has been in use for over 20 years. It provides for only two classes of sales—"dealer" and "consumer". Sales to commercial accounts being designated as "consumer".'

I will ask you if upon an inspection of the invoice there attached you agree with the notation?

"A. Yes.

"Q. And in the lower right hand corner is the place for the designation circle?

"A. It is.

"Q. Now, sir, having reviewed in gross detail the particular memoranda or notations which appear in your Exhibit 1, and having reviewed to your own satisfaction the

accounting documents or bulletins to which those
1016 notations refer, I will ask you if each and all of those notations reflects your own understanding of your company's position and views in classifying accounts —classifying sales by its retail stores or through its independent or retail dealers?

"A. That is correct.

"Q. Are the accounting records which are in use by your employer, Firestone Tire and Rubber Company, today consistent with those exemplified in your Exhibit 1 in respect to this classification of sales by your stores or dealers as either sales for resale which bear the notation 'dealer' or as sales to consumer which apparently bear the notation or caption 'consumer sales'?

"A. They are exactly the same as far as all Firestone Company-owned stores are concerned, and while I can't answer with the same degree of sureness as far as our 4200 direct dealers are concerned, it is my understanding that practically all of our dealers would have the same classification.

"Q. But with regard to the stores that Firestone itself operates, this classification, as I understand your testimony, is maintained today?

1017 "A. Is exactly the same.

"Q. Right. Now, then, sir, in addition to this classification of sales at your retail level into dealer and consumer, for accounting purposes and billing purposes and whatever else these documents refer to, can you tell us of any other instance in which that same classification is adhered to by Firestone Tire and Rubber Company in connection with the operation of its stores. To make my question perhaps a little more clear, does it in any way enter into any provisions of lease contracts, for example, in which Firestone Tire and Rubber Company may enter

for the use and occupancy of premises for its own company stores?

"A. In all of these lease arrangements that Firestone has where there is a—where part of the rental is based on the sales volume, in each of those cases, the rental fee is based on consumer and not dealer.

"Q. So that if I understand you correctly, those sales which are categorized as consumer sales enter into the amount of rent in some cases which Firestone Tire and Rubber Company pays for the premises occupied in some cases by its company stores?

"A. That is correct.

1018 "Q. Now, in deriving or defining this term, 'consumer sales' for the purpose of such lease provisions, what is included within the term?

"A. Any sale that is not a sale for resale. We make no distinction as to a different type of consumer sale. We just have two classifications. Merchandise is either sold to a dealer for resale, or it is sold to the consumer who consumes it.

"Q. And in applying the term 'consumer sales' for purposes of the lease agreements, does the term 'consumer sales' include sales to commercial accounts?

"A. It does.

"Q. Now, then, Mr. Hinderscheid, if you would, sir, tell us—you have indicated at one or two points in your testimony already, but would you tell us the number of retail stores that are operated by your employer, Firestone Tire and Rubber Company?

"A. Firestone operates approximately—I may be off one or two—approximately 780 stores, of which approximately 30 are what we call one hundred percent wholesale stores. The other 750, approximately are retail stores.

"Q. In addition to that, does Firestone have dealers
1019 that sell its products but are not owned or controlled as such by Firestone Tire and Rubber Company?

"A. Yes, we have approximately—we have approximately, all told, some 13,000 direct dealers. I use the term 4200 to designate those that are perhaps larger stores.

"Q. And would you explain briefly what the term direct dealer means in that connotation?

"A. A direct dealer is a dealer who buys his merchandise direct from the Firestone Tire and Rubber Company which is comprised of 50 branch offices in the United States.

"Q. In addition to that, are Firestone Tire and Rubber Company products handled or sold at the retail level through any other outlets?

"A. The other outlets that Firestone products are sold through are what we call associate dealers, numbering some 40 to 50 thousand who buy their merchandise from either a Firestone Store or a Firestone direct dealer.

"Q. And did you give us the name of such approximately 50,000 people?

"A. Associate dealers.

"Q. Am I correct in thinking, then, that the distinction between your category of associate dealer and direct
1020 dealer is that which the term 'direct dealer' implies, namely that a direct dealer buys directly from a branch or district of Firestone Tire and Rubber Company?

"A. Yes.

"Q. Whereas as associate dealer would buy from one of your company stores or one of the direct dealers?

"A. That is correct.

"Q. Or, I presume it would buy from more than one, but at least that is true?

"A. Yes.

"Q. Would you indicate briefly what the chain of command or chain of organization may be for this trade sales department which you have already explained?

"A. The trade sales organization, do you want names?

"Q. No, sir, just the title and power?

"A. Trade sales organization is headed up by the position of general trade sales manager. In the home office, there are several staff positions which report directly to the general trade sales manager such as managers of various product sales such as merchandising manager, such as advertising manager, such as manager of dealer sales, such as manager of Firestone Stores, such as
1021 operating manager, such as manager of mileage sale, such as personnel manager, such as manager of sales training. There may be a few more.

"Q. And are all of those positions which you have just named, would they be identified as home office positions?

"A. They are home office positions.

"Q. Now, then, in your Sales Department, what is the method of control, that is the chain of command, for domestic, that is, United States sales?

"A. United States, outside of home office administration, the United States is broken down into six sales divisions located in New York, Akron, Atlanta, Dallas, Los Angeles, and Chicago.

"Q. And while I don't think the actual locations are important, but is your division, the six divisions you described, further subdivided into regions or districts or in any manner?

"A. The six sales divisions are further divided into 50 districts or branches. The 50 branches are further broken down from the standpoint of company stores into approximately 780, and also territory-wise, into some 13,000 direct dealers, and on down into associate dealers buying from

direct dealers, and company-owned stores into some approximate 40 or 50 thousand.

1022 "Q. Now, then, sir, the term is used in the rubber industry 'national account sales', and I would like if you would, sir, give us the benefit of a brief description of what a national account sale is, and the kind of transaction it involved?

"A. A national account, as the name implies, is a customer whose locations are national in scope, who gets his—picks up his merchandise from either direct dealers or Firestone stores. A national account is the type of account that would buy at least some 50 thousand dollars or more in annual volume.

All national accounts are billed on home office bills at two levels, home office or division sales manager level.

"Q. And may I interrupt here, please, sir, how many men at home office would be entitled or authorized to enter into a national account transaction or agreement?

"A. With the exception of the stenographers and so-called clerks, there is one manager of national account sales at the home office level, and each division, numbering six, has a manager of national sales.

"Q. I believe you may have misunderstood my question and I may have slurred or let my voice drop. My question was as to the personnel who had the authority

1023 to enter into a national account agreement, and I think I can gainsay the fact that a stenographer or a clerk would not.

"A. The final approval on a national account agreement is at the discretion of the general trade sales manager.

"Q. Now, then, you indicated that he had representatives at each of the six division offices of your company's sales department. Does he have a single representative at each one of these six divisions?

"A. He has a single representative at each of the six divisions, and he has a home office representative in Akron.

"Q. So that in terms of authority to make national account agreements, that authority vests in six individuals at division level and in, of course, their superior at the home office?

"A. Actually, at the division level, those representatives do not have the authority to enter into any particular price agreement, nor does the manager of national account sales at the home office level have that authority. That authority, final authority, rests with the general trade sales manager.

"Q. Well, what is it that these six individuals, one
1024 each at your six divisions, what is their function?

"A. Their function is to solicit the sales from present national accounts and solicit sales to new national accounts which we presently do not sell.

"Q. And then when the solicitation is made and terms are being discussed as I understood it from your earlier testimony, they must get confirmation from a particular individual at the home office before any binding agreement is to be made?

"A. That is correct.

"Q. Now, then, does anyone below the division level—that is, at the district level or at one of your company stores, or possibly even at one of your direct dealers, have any authority to engage Firestone Tire and Rubber Company in one of these national account transactions?

"A. Under no circumstances from the standpoint of price or any unusual—no price, no contract.

"Q. Now, sir, if we may, I would like to trace one of these national account transactions through the apparatus to serve your national accounts in the Firestone organization and my first question is: Let's take a case in which a

national account agreement has been made between
1025 Firestone Tire and Rubber Company and some national concern. Is any service rendered under that national account agreement by one of your associate dealers?

"A. No.

"Q. Can service be rendered pursuant to that agreement by one of your direct dealers as well as by one of your company stores?

"A. Yes. I should qualify the first statement. I can't say that there has never been a case where an associate dealer does not deliver something to a national account. If it did happen, it would be in one case out of 10,000.

"Q. Well, we can confine my inquiry to the extent that you want to qualify it, but my inquiry will be to the typical pattern of the national account transaction and sale.

Now, then, at—let's take a direct dealer's location. What happens when a national account, representative of a national account comes in, and let's say that the vehicle he brings in is a truck and in accordance with some national account agreement between his home office one of the gentlemen you have described in the managment of Firestone, he is entitled to buy under this agreement?

1026 "A. As a—there are different agreements, of course, as far as national accounts are concerned, but the general procedure is for the particular piece of equipment, be it passenger car or small truck, would come into a dealer's place of business, present certain identification, or a purchase order, and again the national accounts vary as to their policy; present a certain document calling for the delivery of certain merchandise.

The dealer, based on this identification or purchase order, would deliver the merchandise to the national

account. In most cases, he would install it on the wheel, or install it in the car in case it would be a battery.

At that time, he would prepare not the sales ticket that we see here, but he would prepare what we call a transfer order. The name of the national account would be shown at the top, purchase order number would be shown, description and quantities of the merchandise would be shown on the transfer order, excluding price, and that transfer order is then sent to the respective Firestone accounting office at which time a merchandise credit would be passed to the dealer delivering the merchandise which would be to reimburse the dealer for his cost
1027 of the merchandise delivered and at that time, a commission passed to the dealer for the service that he was rendering.

"Q. And now this commission that passes to the dealer as you have just last stated is for services as you state. How and what are the services rendered by such a direct dealer in that kind of transaction?

"A. Well, the service rendered to start with is having available merchandise. The dealer has to buy that merchandise and has had to warehouse the merchandise. He has his money invested in the tires, and then he delivers it to the national account. As I mentioned in most cases, the merchandise is installed on the wheels or in the equipment of the—of the equipment, and the preparation of the documents which transfer the merchandise, in effect, to the home office where it is billed on the home office billing. It is for those services that a commission is passed on to the dealer.

"Q. All right, sir. Does the dealer who is a direct dealer of Firestone products have anything to do with the billing of the national account customer?

"A. He has nothing to do with the billing other than to prepare the transfer ticket. He doesn't even know what the price is.

1028 "Q. That was my next question. Would he have the price at which the national account was going to pay?

"A. No.

"Q. Does he have anything to do with collecting from the national account customer?

"A. He has nothing to do with the collection.

"Q. And I think you have already indicated that he had nothing to do with the establishment of the price at which the transaction took place?

"A. That is correct.

"Q. In the event of some adjustment that might have to be made, at what level would that occur? That is, where does the national account customer come to advise a complaint, or to seek to have some adjustment, either because of poor performance of the product, or otherwise?

"A. The chain of events there would be for the national account to register his complaint with his home office, and the home office of the national account would then get in touch or complain to either the national account's manager at the division level, or in some cases direct to the manager of national accounts at Akron.

1029 "Q. Now, I believe you may have already stated this, but I wanted to be sure the record was clear on it. You indicated that at the time this transfer slip, in lieu of a regular sales invoice, is made out by the direct dealer reflecting the merchandise that was delivered to and possibly installed on a national account vehicle, at the time that transfer ticket is presented, an adjustment is made for the cost to the dealer, and that is the point I wanted to get, of the merchandise delivered?

"A. We call it a merchandise credit. The dealer's current buying price—I will give you an example to point out the transaction.

A dealer perhaps purchased one hundred, or whatever the amount was, of 670-115 passenger tires, the net cost to him might be $15 of each of the tires, totaling $60 for the four.

At the time that the accounting office receives this transfer ticket from the direct dealer, they determine the dealer's buying price and at that time they pass a merchandise credit to the dealer for the $60 which relieves him of the cost of the merchandise and at the same time passes him a delivery commission for service rendered.

Mr. Mitchell: I believe that is all I have.

1030 **Cross-Examination,**

By Mr. Tincher:

"Q. Mr. Hinderscheid, in speaking of the procedure by which a dealer will serve a national account, you referred to some requirement that the purchaser make proper identification. Would you elaborate on that a little bit?

"A. Well, various national accounts have different procedures. Some of them is to prepare a purchase order which indicates the name of a company, the name of the dealer, and the merchandise to be purchased. Others, in the minority, would have—the salesman in the truck or the car, would merely have a personal identification with a purchase order. The majority of national accounts use the purchase order system. The minority of national accounts do not. Generally speaking, the salesman or the driver of the automobile equipment coming into the dealer's place of business, that salesman would have it previously approved through a purchase order to purchase or pick up X merchandise, whether it be a battery or a tire or some other part. It is generally, in practically all cases, confined to tires and batteries.

"Q. Are some of the national accounts served through

your direct dealers simply by having a credit card
1031 or something similar to a credit card?

"A. That may be his means of identification, but, again, I am talking about the general scope of merchandise. The dealer does not bill the national account from his own books which would assume the use of a credit card. Now, that is where the most general merchandise that is picked up, however, there may be cases where a national account would come in and say he wanted to get his car lubricated, for whatever price. There may be some national accounts, few in number, where that would be good locally, but the very large—very large majority of merchandise or service that is picked up, so to speak, by the national account is tires and batteries.

"Q. I notice here from letter No. 12 which appears in your Exhibit No. 1, Paragraph No. 4, sales to national accounts, this sentence——

"A. Under which section?

"Q. Letter No. 12, sales transactions?

"A. All right.

"Q. The last sentence under Paragraph No. 4, 'Stores making such deliveries will receive full sales credit and profit from the transaction'.

1032 Is that consistent with your testimony that the delivering store or dealer is issued by your company a credit slip, I believe you said, and then is paid a commission for the service he performs?

"A. You are now talking about a Firestone Store?

"Q. Is that the distinction?

"A. Are you talking about a Firestone Store or a Firestone dealer?

"Q. I am asking you whether this reference here in Paragraph No. 4 relates to the same thing that your testimony did when you testified that after delivery has been made to a national account customer, the dealer is given a credit——

"A. Merchandise credit.

"Q. ——merchandise credit for that delivery?

"A. That is correct in the case of a dealer. In the case of a Firestone Store, it is still correct except that in the case of a Firestone Store, when we pass the merchandise credit back to the Firestone Company Store, that has the same effect as a merchandise credit to the dealer. It relieves the store of the cost of the merchandise that he delivered to the national account, but in addition,
1033 as far as a Firestone Company-owned store is concerned, at that same time, two tickets are passed to the company store, one of which is a sales value and the other one is 90 per cent of that sales value, which permits the store to make ten percent in the form of commission exactly the same as the dealer.

"Q. Does the dealer get a ten per cent commission for such a transaction?

"A. He does.

"Q. And on what is the ten percent based?

"A. We have—we have a certain price level, so to speak, in our system of discounts where we take that particular level at X discount.

"Q. Would that be, generally speaking, the price at which he has bought the tires?

"A. Not necessarily.

"Q. Would it be normally more or normally less, or how would it compare?

"A. Oh, it would be a higher price than he had bought the tire. It all depends on which type of dealer it was, because a dealer is based on volume and buy their products at different prices because of the volume differential, and so forth. We strike a level somewhere in our
1034 system of discounts on which we compute the ten per cent.

"Q. And generally speaking, then, would it be true that

the ten per cent commission paid to your direct dealer is not less than ten per cent of the cost to him at which such merchandise had been billed originally?

"A. It would not be less than he—he would end up getting not less than ten per cent.

"Q. But in the case of a store, the store is given credit for making a sale, is that it?

"A. He ultimately ends up with a sales value of, say a hundred. At the same time a charge comes through at a cost of 90 which permits him to make ten per cent commission.

Mr. Tincher: May we go off the record?

(Discussion off the record.)

By Mr. Tincher:

"Q. Mr. Hinderscheid, after a merchandise credit has been issued to the dealer by Firestone, is that credit then recorded in any of the accounting forms which are included here in your Exhibit No. 1?

"A. Not in these exhibits because these exhibits are Firestone Stores' profit and loss statements.

"Q. All right.

1035 "A. There is no form in here that has to do with a dealer.

"Q. Does Firestone get from its direct dealers any balance sheet or profit and loss statement which would reflect the merchandise credit the company allows on these national account transactions?

"A. We have some dealers who are small in number which gives their local district office a statement of sales and expenses in gross monthly or quarterly, with the idea in mind that the district will be able to point out from that P and L statment weaknesses whereby the dealer should do more of this or that or the other thing to help him in his business.

"Q. Then I take it that as a general rule, your direct

dealers do not provide Firestone with profit and loss statements or balance sheets?

"A. That is correct.

"Q. I understood your testimony earlier in response to questions from Mr. Mitchell to indicate that merchandise credit to the dealer is given at the dealer's buying price for the particular item delivered to a national account?

"A. Current buying price.

"Q. That is my question. Is that the current buying
1036 price of the dealer?

"A. Yes. That is understandable because the dealer delivers, for example, four tires. The dealer may have purchased those tires a week ago, six weeks ago, or six months ago at which time the price might have been different. We have no way of determining at what price those four particular tires were purchased at, so what we do is to take the current dealer's buying price of the merchandise and pass the credit, only for the reason we don't know what price he bought them at.

"Q. Mr. Hinderscheid, on the second sheet in this folder which has been made Exhibit 1 to your deposition, there is this paragraph 'It will be noted from the following Firestone exhibits that Firestone uses "consumer" sales and also uses "retail" sales and that it uses such quoted terms interchangeably and synonymously.' In any of the accounting procedures which you have followed during the course of your employment by Firestone, have you used the term 'retail', and if so, in what connection?

"A. Over the years there have been—sometimes we would call sales other than dealers retail, other times consumer; for the past many years, consumer.

1037 "Q. Would you say, then, that since the year 1950, for example, would it be correct to say that the

company has not used the term 'retail sales' in its accounting procedures?

"A. I would say that is right.

"Q. Then, if I am correct in thumbing through your Exhibit No. 1, only in that section which is tabbed G is the term 'retail sales' used, and I will read from the paragraph which appears on the sheet captioned 'Firestone Exhibit G, Store Operating Letter, May, 1938.'

'Applicable excerpts from this operating letter furnish instructions for recording various types of sales. At this time, the same distinction between consumer sales and dealer sales was maintained, but "retail sales" was used instead of "consumer sales" in this operating letter, which, of course, is different from a chart of accounts. Although not specifically spelled out, except in the case of gasoline, all sales to commercial accounts were included in "retail sales".'

"Do you know why the term 'retail sales' was used in the particular transactions referred to here in this Section G of your Exhibit No. 1?

1038 "A. No.

"Q. Did you participate in any way in the preparation of this Section G, the paragraph I have read or the sheets which follow that and which are within the section which is tabbed with a G?

"A. In 1938, my capacity was not the preparation of policy or sales letters. In 1938, I was working in the field as stores accountant.

"Q. Would the operating instructions contained in letter No. 13, which letter has been dated May, 1938, would such operating instructions have been in effect any time since 1950 in your company?

"A. I am not sure I understand your question.

"Q. Suppose you look at this Section G, particularly the second sheet in that section which is headed 'Letter

No. 12,' and indicates four pages, and states 'Effective May, 1938.' Would you look at that entire section and then tell us whether the operating instructions contained in that letter are, in substance, the same as the operating instructions you have followed at any time since 1950?

For clarification and to save time, I have reference only to that section which is headed "Retail Sales,"
1039 and any material within these pages which specifically refers to retail sales?

"A. Let me try to answer your question this way: As far as any references to commercial sales are concerned, commercial sales in 1938 were included in retail sales and commercial sales are included in consumer sales which is the terminology that we use today.

As far as any reference to national accounts are concerned, I do not remember back in 1938 exactly what our program was at that time, but for the past ten years, a sale to a national account is construed to be a delivery by the Firestone Store to the national account with the proper transfer ticket being prepared which ends up billing the account on the home office books.

"Q. For clarification, will you examine your Exhibit No. 1 and state whether or not four pages are included of this letter No. 12 which indicates on its first page four pages? This is in Section G?

"A. I am not clear on your question.

"Q. Do you find that there are four pages, in fact?

"A. I find four pages, yes.

"Q. Well, of letter No. 13, isn't it a fact that only
1040 page 1 and page 2 are included?

"A. That is correct.

"Q. I just wanted to be sure that my particular copy hadn't left out some pages.

Do you know when the Firestone Company discontinued its use of the term "retail sales" in connection with the

type sales that were referred to here in letter No. 12 as "retail sales"?

"A. I do not remember.

"Q. Do you know whether it was sometime prior to 1950?

Mr. Mitchell: May I suggest the discontinuance of the particular term could well be something which the witness has already indicated he doesn't have any particular memory of, but I might suggest, it could refresh his memory if he would turn to letter N-5 which follows exhibit or is a part of Exhibit 1, and which, as I see it, is dated in October—dated October 1, 1945, and which would apparently reflect a return to the use of the term "consumer," and if perhaps that would facilitate his recollection of the re-emergence of this term "consumer". It might expedite things.

1041 By Mr. Tincher:

"Q. Can you now answer the question?

"A. Off the record?

(Discussion off the record.)

Mr. Mitchell: Would you please restate substantially what you just said?

The Witness: I do not remember exactly the date as to when the terminology might have been changed from "retail" to "consumer". It could very well be that a sales manager that we had several years ago preferred the use of the terminology "retail". It could be that some years later a sales manager determined that he liked the word "consumer" better, but for the past approximate ten years, we have stayed with the word "consumer", to mean merchandise sold to any type of customer other than dealer.

By Mr. Tincher:

"Q. Now, Mr. Hinderscheid, would it be fair to say

that some of the sales classified by Firestone as consumer sales are, in fact, wholesale sales?

"A. A wholesale sale is a sale to a dealer for resale, and in our policies and procedures, it has nothing to do with a consumer sale.

1042 "Q. Then, from your experience working with Firestone, you consider that wholesale sale would refer only to sales to dealers for resale purposes?

"A. That is right.

"Q. And based on the same experience, you would state that any other sale would be in the category of retail sales, is that correct?

"A. Retail or consumer.

"Q. All right, now, do you in your experience with the company find that any of the consumer sales made by your company or by its dealers would fall into a category which you would class as non-retail sales?

"A. No.

"Q. In what category does your company, for accounting purposes, place its national account sales as you have stated in quantities or volume of $50,000 per year or more as retail sales?

"A. Any sale in any volume to a national account sale is considered a consumer sale.

"Q. But my question is: Do you also consider it a retail sale?

"A. I make no distinction between consumer and retail.

1043 "Q. Do you consider a sale to a national account in the same category with respect to classifying it as a retail sale as a fleet sale by one of Firestone's direct dealers?

"A. Yes.

"Q. What does the term 'fleet sale' normally involve?

"A. A fleet sale would normally be a sale to a consumer account who may have five trucks or more.

"Q. All right. Does the sale price to a fleet account which has, let's say, five vehicles—correction, withdraw that.

Is the price which your dealers charge to an account with five vehicles the same as the price that he would charge to a fleet account with 20 vehicles?

"A. They might be the same, they might be different.

"Q. Normally, which price would be lower per unit?

"A. Normally, the sale to the larger account would be the lower one.

"Q. Would the sale price to your company's national accounts normally be lower per unit than the sale price which a dealer would quote and use in making sales to a fleet account of 20 vehicles?

1044 "A. Not necessarily, because the price that a so-called fleet account pays has no bearing whatsoever on the price that a national account pays. There are market conditions, the size of the account, and other things that determine the price that the consumer pays for the merchandise.

"Q. Generally, though, Mr. Hinderscheid, isn't it true that the prices charged to your national accounts are lower than the prices which your dealer can sell fleet accounts and make a profit?

"A. Not necessarily, no.

"Q. Is that sometimes the case?

"A. There may be cases where a fleet account buys at a price less than a national account buys at. There may be cases where a national account would pay prices lower than what a fleet account would pay.

"Q. Would it also be true that in some cases a national account price might be lower than the prices at which Firestone sells tires to its direct dealers?

"A. There would be.

"Q. Isn't it true, isn't that a fact that it sometimes is lower?

"A. I would say in the minority, but there are cases.

1045 "Q. All right, and when those sales are made by your company to a national account at a price which is lower than the price which you charge your direct dealer, you would still classify that national account sale as a retail sale?

"A. Retail or consumer.

"Q. Would you class it as a retail sale?

"A. For the past ten years, we have classified them as consumer sales.

"Q. Would you state whether in your experience in the sales and accounting field, you would classify your sales to national accounts as retail sales?

"A. Over the past many years, we have always classified a sale to a national account as either retail or consumer.

"Q. I don't understand your language, retail or consumer?

"A. I use it interchangeably. Sometimes we call it retail as reflected by operating letter No. 12 dated 1938. Subsequent letters use the terminology as consumer.

"Q. Well, in the past ten years in the accounting procedures of your company, would the national account sales be properly classified as retail sales?

"A. The past ten years, they would be properly classified as consumer sales.

"Q. But not as retail sales?

1046 "A. Again, I repeat, retail and—the term retail and the term consumer are used interchangeably.

"Q. By whom?

"A. By Firestone.

"Q. By you in your accounting practices?

"A. In our accounting and in our overall sales policies. There is no distinction.

"Q. Isn't it true that, as a matter of fact, you don't use the classification retail at all during the past ten years?

"A. We used the word 'consumer' during the past ten years?

"Q. Yes.

"A. Only to differentiate from dealer.

"Q. Then, why do you say that you use the term consumer sales and retail sales interchangeably?

"A. As I mentioned previously, it could be that back in 1938 a sales manager preferred to use the word 'retail'. In the past ten years, our sales manager has apparently preferred to use the word 'consumer'.

"Q. Now, I am sure you are not attempting to evade my question, Mr. Hinderscheid, but I seem to have trouble getting a direct answer from you, and this question relates only to the period of time in recent years, and
1047 for convenience, we will say during the past ten years. Do you, in your accounting procedures, use the term 'retail' in connection with your sales to national accounts?

Mr. Mitchell: Just a moment.

The Witness: Use the word "consumer".

Mr. Mitchell: Just a moment. The word "evade" having come into the record, I think it is apparent that the witness's intention and effort is altogether to the contrary, and the witness has sought manfully to answer the same question several times.

Might I suggest, Counsel, that if you introduce the time element as to the interchangeable use, that is whether or not Firestone at any given time, used the term interchangeably, you might clarify the situation. I don't know that you would, but I do not want this record to include

any reflection on evasion when it has absolutely no application.

Mr. Tincher: Thank you, Counsel.

I was not implying that the witness was attempting to evade. The time element has been limited in my question to recent years. For convenience, we used the term the past ten years.

1048 By Mr. Tincher:

"Q. Have you, during the past ten years at any time, used the terms 'consumer sales' and 'retail sales' interchangeably in your accounting practices for Firestone?

"A. To my knowledge, during the past ten years we have consistently used the word 'consumer sales' to differentiate from dealer sales, and any sale to a national account, commercial account, of any size, is construed to be consumer.

"Q. Does Firestone have any national accounts which include sales of recapped tires?

"A. Yes.

"Q. Would they be exclusively for recapped tires or would they include recapped tires as well as new tires?

"A. There are some national accounts that would buy recapped tires. Other national accounts purchase only new tires.

"Q. These accounts which purchased recapped tires, I assume, would be served in part by various direct dealers which the company has around the country?

"A. They may be served by direct dealers or Firestone Stores, or by a combination of both.

"Q. Yes. Is there a standard price in your company for recapped tires based upon the size or grade and so forth?

1049 "A. To national accounts?

"Q. Yes.

"A. There is no standard price because the price that is arrived at by negotiations between the home office and the home office of the national account would determine not only the price of new tires, but recaps as well.

The prices of recaps may vary to different national accounts just the same as the prices of new tires vary to various national accounts.

"Q. Would the price of the recapped tires be uniform with reference to your direct dealers?

"A. No.

"Q. In what way would the direct dealer determine the payment that he is to receive for servicing one of your national accounts with recapped tires?

"A. If the dealer delivered a recapped tire to a national account, and if that tire were to be billed on the home office books, that dealer would receive a merchandise credit equal to the price the dealer pays currently for the tire.

"Q. Do some of your dealers do recapping at their own establishment?

1050 "A. A minority, a very small minority of our 13,000 direct dealers.

Mr. Tincher: I believe that is all the questions I have.

**Redirect Examination,**

By Mr. Mitchell:

"Q. Just one point, I believe, Mr. Hinderscheid. In your cross-examination I know, and perhaps also earlier in your direct testimony, the term 'fleet sale' and 'fleet account' was encountered. I would ask you, sir, whether or not such a fleet account or fleet sale is included within the term 'commercial accounts' which appears in several places in the notations throughout your Exhibit 1?

"A. It is. We make no distinction in a commercial account sale which is, again, a consumer sale, whether the

so-called commercial account purchases one tire or 500 tires.

"Q. And if I may, sir, in answer specifically to my question, then, the term 'commercial account' encompasses fleet accounts?

"A. Yes.

"Q. The one is a part of the other?

1051 "A. That is correct.

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1053 **DEPOSITION OF REUBEN E. HEDLUND.**

* * * * * * *

**"REUBEN E. HEDLUND,**

the said witness, being duly sworn, deposes and says as follows:

**Direct Examination,**

By Mr. Mitchell:

"Q. 1. Will you state your name, please?

"A. Reuben E. Hedlund.

"Q. 2. What is your office address, please, Mr. Hedlund?

"A. 624 South Michigan Avenue, room 1000.

"Q. 3. Is that in the City of Chicago, Illinois?

"A. Yes.

"Q. 4. Are we taking this deposition in your office at that location?

"A. That is correct.

"Q. 5. Are you also a resident of Chicago or some nearby residential community?

1056 "A. I live in Chicago.

"Q. 6. Mr. Hedlund, we are taking your deposition in the case of Goldberg, Secretary of Labor, against Steepleton General Tire Company of Memphis, Tennessee,

and Mr. Steepleton, individually, and I want to give you the frame of reference of my questions, so that you may adopt your responses accordingly.

Mr. Steepleton is engaged in the tire business as an independent dealer, handling primarily products of General Tire Company. He does not engage in business for export, nor does he engage in business directly with manufacturers of automobiles which are, I believe, called original equipment transactions in the tire industry. He does engage in business with customers in the community of Memphis, Tennessee, where his place of business is.

So that, as I indicated, whatever questions I ask you about the kind and types of tire merchandise, will be with reference to that kind of an outlet for tires.

"A. Yes, sir.

"Q. 7. Now, then, sir, would you state what positions you presently hold, please, sir?

"A. At the present time I am vice-president of
1057 Cell-O-Core Company of Akron, Ohio, I am executive secretary of the Chicago Tire Dealers Association, I am editor and publisher of 'This Week in Tires', a trade media, and I am a columnist of the trade magazine named 'TBA Marketer'.

"Q. 8. First with regard to Cell-o-Core Company, would you say, please, if it has anything to do with the tire industry?

"A. That has absolutely nothing to do with the tire industry.

"Q. 9. On the other hand, the other three occupations which you have given us with respect to the publications and with respect to the trade associations, will you state whether or not they are directly related to and concerned altogether with the tire industry?

"A. Very much directly concerned and connected with the tire industry.

"Q. 10. And would you state, please, sir, if you could, I just want any sort of a general average, about what percentage of your time is devoted to these callings which are directly related with the tire industry as opposed to your status of a president of an entirely unrelated business?

"A. I would say that 25 percent of my time is used
1058 in connection with the Chicago Tire Dealers Association, and 25 percent of it with editing and publishing 'This Week in Tires', and a very—perhaps 2 percent of my time writing my column for TBA Marketer.

"Q. 11. Now, then, would you trace and briefly describe, please, sir, your background, your experiences, your various positions in the tire industry, telling us generally when you first came in this industry, and the periods of time you spent at your different positions in it.

"A. I came into the tire industry in Akron, Ohio, in 1923, being employed by Miller Rubber Company as a time study engineer.

After two years with Miller, I went with Kelly Springfield Tire Company of Akron, for about four years as production engineer.

I then went with India Tire & Rubber Corporation for five years in sales, and when I left India I was an assistant sales manager.

I then went with Firestone Tire & Rubber Company for about seven years as district manager at Fargo, North Dakota, Minneapolis, Minnesota, Omaha, Nebraska and Chicago, Illinois.

1059 I subsequently then went with U. S. Rubber Company of New York as district manager, then division manager, and just before Pearl Harbor I was assistant sales manager of the U. S. Tire Division.

During the war I was sales manager of all military tires, airplane tires and bullet sealing tanks.

I left U. S. Rubber in 1945 to go in business for myself in Chicago. Do you want me to go on from there?

"Q. 12. Yes, if you would, please, sir, just bring us on down to date.

"A. In 1946 I was hired as executive secretary of the Chicago Tire Dealers Association, which was formed in 1920, and I still function in that capacity as of today.

"Q. 13. Now, then, Mr. Hedlund, during the period of let us say since 1945, have you also been engaged as a columnist or in the editorial or publishing end of the tire industry in any way, and if so, would you outline what your early experience has been in that connection?

"A. I started about in 1947 as a columnist for the Modern Tire Dealer, published in New York City, about in 1950 as a contributing columnist to Dealer News of Washington, D. C., a publication of the National
1060 Association of Independent Tire Dealers and Retreaders, and about in '58 I became a columnist also for a publication Tyres & Accessories, and the word tires is spelt T-y-r-e-s. That is printed in London, England, and circulated in approximately forty countries.

A little over two years ago I abandoned all trade paper columns and started my own media called "This Week in Tires".

"Q. 14. Would you describe, please, Mr. Hedlund, the nature and circulation and editorial policy and purpose of your own publication "This Week in Tires"?

"A. I don't want to appear altruistic, but I felt there was a need for somebody to do what is really an educational job in principally an independent tire dealer level, in a format consisting of basically four pages, and which I hoped could be read in ten minutes. This carries all trends, all interpretations of industrial tire policies, plus a back page editorial basically aimed to improve the profit climate of independent tire dealers.

"Q. 15. Is this emphasis upon educating and keeping independent tire dealers informed as to the patterns
1061 and trends in the tire industry which you have just related serves as one of the motives of your publication called "This Week in Tires", is this interest on your part a thing that existed before you started the publication about two years ago?

"A. This was an accumulation of some ideas, and ambition to do a better job than I sensed was being done by any other trade media, and very frankly, it was done with an altruistic non-profit idea to try and repay the tire industry, which has been very wonderful to me measured financially or any other way of trying to say what one owes in an affiliation with an industry for close to forty years.

"Q. 16. Has this interest in an emphasis on your part upon education and indoctrination of people in the tire retailing business, taken any other forms, and by that I refer to trading programs, seminars, or anything of that sort, in past years?

"A. I think I could answer that question this way, that as I grew up with thousands of independent tire dealers, I recognized that many of them had very limited education, and as they were about to retire or passed away, that the heritage of their sons could be carried on
1062 through what I still call education, to make them better business men. And mainly to preserve their identity as a typical small American business man.

"Q. 17. Would you tell us what you did about your interest in having the sons of the elder tire dealers indoctrinated or taught in the ways of the typical small business man?

"A. This is a little bit embarrassing, but I went to the Akron University and talked to Dr. Warren Lee, who

suggested that we start a management course primarily for independent dealers' sons.

This pattern or course was kept going for about four years, and was then emulated by the National Tire Dealers Association, plus the fact that certain tire suppliers thought it expedient to set up similar educational courses for their own dealers' sons.

"Q. 18. Do you know whether or not these same sort of courses continue to be taught? I mean periodically.

"A. To the best of my knowledge the National Tire Dealers Association still run them in Georgia, California, and it just so happens this week that there is one being run at Las Vegas, Nevada. This particular management seminar was previously held in Florida.

1063 "Q. 19. During your long years of experience in writing for the tire industry and trade publications in the tire industry, have you on occasion been asked to appear as a speaker on forums that were for members of tire industry associations, or for the general public, or in any capacity as a speaker?

"A. This is getting a little embarrassing, but I have talked to the TBA group of the oil industry at their annual conference in St. Louis.

"Q. 20. May I interrupt one moment, sir. Would you explain what 'TBA' is, sir? We are not all familiar with it.

"A. That is the tire, battery, accessory group.

"Q. 21. Would you proceed?

"A. I talked annually to the California State Tire Dealers Convention. I talked occasionally to the Canadian Tire Dealers Conference. I have talked to the International Tire Dealers & Retreaders meeting in London. I have been master of ceremonies of the Louisville Retreaders Conference group at Louisville, Kentucky. I have talked to local tire dealers associations in Minneapolis,

Milwaukee, Pittsburgh, and several other cities whose names escape me at the moment.

"Q. 22. I believe you indicated, Mr. Hedlund, that you took the role and position of executive secretary
1064 of the Chicago Tire Dealers Association in 1946, and that you continue to hold that position at the present time. Would you state, please, Mr. Hedlund, in a general and reasonably brief outline, what the Chicago Tire Dealers Association is, who its members are, the characteristics of its policies and programs, and in summary just tell us something about the organization.

"A. This is America's oldest local tire dealer association. In fact, I think it precedes the National Tire Dealers Association by one year, being formed in 1920.

I had run the Chicago District Office for both Firestone and U. S. Rubber, and the executive committee of the association came to me and asked if I would be interested in heading up their local association.

We worked strictly in a climate on a non-profit basis, trying to handle amicably our union problems and opportunities. We try to become better acquainted, and I believe basically we function just like any other association does in connection with its membership.

"Q. 23. I have noticed that in your reference to the National Tire Dealers Association you have sometimes used the phrase 'independent' and I see that the word 'independent' is not in your own Chicago Trade As-
1065 sociation's name. Would you state whether or not the membership of the Chicago Trade Association is restricted to independent dealers or does it encompass something more than independent dealers?

"A. No. We have—and this was my idea back in '46—have a current membership of approximately sixty independent tire dealers and about twenty-five company owned stores. And as a matter of interest, our board of directors

consist of thirteen, nine are independent tire dealers and four are so-called company owned store managers.

"Q. 24. And when you use the phrase 'company owned stores', Mr. Hedlund, am I correct in construing that you mean stores that are operated or are controlled by one of the tire manufacturers, for example, the Firestone firm or the Goodyear firm?

"A. This is correct. Firestone, Goodyear, Goodrich, General and U. S. have company owned store operations in Chicago.

"Q. 25. At my request, Mr. Hedlund, you have given me a piece of stationery showing the letterhead of, I believe, the present executives and board of directors of your Chicago Tire Dealers Association, and I will ask you to identify that, if my description of it is correct, and make that Exhibit 1 of your deposition.

1066 "A. This is correct as our current executive committee and board of directors.

Mr. Mitchell: And if you will, please, mark that as Exhibit 1.

(Whereupon said document was marked Exhibit 1—Hedlund Deposition.)

By Mr. Mitchell:

"Q. 26. I notice at the very bottom of the Chicago Tire Dealers Association stationery there are affiliations shown, one of which is abbreviated 'NTDRA—Washington, D. C.' Would you for clarification, Mr. Hedlund, explain what those initials stand for?

"A. Let me say that not every member of the Chicago Tire Dealers Association is affiliated with the National Tire Dealers Association, but possibly 70 percent do. We have no direct connection, we are strictly independent, however, many of my members are long time members of National. In fact, my secretary-treasurer, Mr. Sam Duxler, is the Northern Illinois director of the National Tire

Dealers, and is currently on the National's executive committee.

"Q. 27. Thank you sir. My question, however, and
1067 I believe perhaps I can interpret it, am I correct in thinking that the initials 'NTDRA' which appear in the lower left-hand corner of your Exhibit 1, stand for 'National Tire Dealers & Retreaders Association'?

"A. That is correct.

"Q. 28. And that is the organization——

"A. National.

"Q. 29. ——which you refer to as 'National'?

"A. As the National.

"Q. 30. Yes. Does your Chicago Trade Association take any interest in or seek to inform its members about legislation on the level of the State of Illinois, or perhaps the City of Chicago, which might or could pertain to or affect such members?

"A. We are very vitally interested in any local legislation, and particularly the legislation that comes out of the Capitol at Springfield, Illinois, and I work very closely with a Mr. Charles Barker, who is the Illinois State Tire Dealers Association's executive secretary.

"Q. 31. By reference to your long experience and varied background in the industry, and by reason of the affiliation of your Chicago Association with the National
1068 Association could you state whether or not that National Association performs the same or similar functions with regard to laws and legislative trends on the national level that your own association performs on the state or local level?

"A. I can say from observation that the National is very alert, very active in connection with any legislation that might have its impact at independent tire dealer levels. It performed admirably in that respect.

"Q. 32. Mr. Hedlund, would you state, please, sir, how

sales are classified in the tire industry and specifically by tire dealers, with regard to whether or not sales may be retail or wholesale sales?

"A. In my estimation there is only two classifications, the two that you mention, either retail or wholesale, or in some independent dealers you might have a smattering of both.

"Q. 33. Would you state, please, sir, what sales are classified first as sales which are wholesale?

"A. Personally, and I think I speak for a lot of people, a wholesale does not go direct to the consumer or customer.

"Q. 34. Where does a wholesale sale go, sir?

"A. The wholesale functions, at least in our in-
1069 dustry, as a middle man between the manufacturer and the dealer. He stocks and sells merchandise to the dealer who, in turn, is the one who sells it to the ultimate customer.

"Q. 35. All right, sir. Is what you have just said with regard to what constitutes a wholesale sale in your opinion, the recognition of a wholesale sale in the tire industry?

"A. As far as I know, this is the identity of a wholesale sale in the tire industry.

"Q. 36. Now, then, if you would, please, Mr. Hedlund, tell us what is a retail sale in the tire industry.

"A. I think this is a very simple answer to your question. A retail sale is where you sell something direct to the consumer or customer, despite what category he may be classified in due to any descriptive verbiage that has been used to try to classify retail sales.

"Q. 37. Am I correct in construing your answer to be that any sale to the ultimate consumer is then a retail sale according to the recognition in the tire industry?

"A. Yes. Let me clarify that a little bit. This is a

sale to the automobile owner, this is a sale to a truck owner or a person who might own a fleet of trucks, this is a sale to anyone where the tire eventually goes right on the wheel.

1070 "Q. 38. Would you please state, Mr. Hedlund, what is recognized in the tire industry as a retail establishment?

"A. Well, I think an answer to this question is anybody that is after retail sales is a retail establishment, where he is trying to do business direct with his customer.

"Q. 39. Now, then, I would like to review with you certain regulations or directives which emanate from the United States Department of Labor, and I am going to read from or refer to a bulletin or pamphlet which is entitled 'Part 779—The Fair Labor Standards Act as Applied to Retailers of Goods or Services,' and which also indicates parenthetically that it is a reprint from the Federal Register dated September 2, 1961, and the particular bulletin or pamphlet to which I refer and have just described, is marked Exhibit 1a to the deposition of Micklish, which has heretofore been taken in this case, and I will particularly direct my questions to that part of this exhibit Section 779.372, and following sections which appear on page 8363 of said exhibit.

And in support of the material in this exhibit at the place indicated, I will ask you to read with me certain sections of it which purport to classify certain categories or types of sales of tires for vehicles in particular

1071 ways, and I refer particularly to sub-paragraph (b) under Section 779.373, which states generally that sales made pursuant to a formal invitation to bid, and illustrates sales made pursuant to bids as being those typically made to the federal, state or local governments. And this bulletin classifies such sales as not being retail sales according to the recognition in the industry.

My question is whether or not in your opinion the tire industry recognizes sales to governmental agencies made pursuant to bids as retail sales or as wholesale sales.

"A. Right here in Chicago we have many independent dealers that bid and secure local and state government business particularly, and we consider this as a retail sale.

"Q. 40. Is that in accordance with your understanding of the recognition throughout the tire industry with respect to such transactions?

"A. I would say that this is the broad, defined description of sales in these categories, that it is understood as a retail sale.

"Q. 41. Now, then, moving on to sub-paragraph (c) under the same section which refers to the so-called 'national accounts' which are, for the purposes of my question defined as follows:

1072 'Sales where delivery is made by the local tire dealer under a centralized pricing arrangement between the customer's national office and the tire manufacturer; payment may be made either to the local dealer or direct to the tire manufacturer under a centralized billing arrangement with the customer's national office.'

Now, then, taking that transaction there described as a national account transaction, Mr. Hedlund, would you state whether or not as recognized in the industry, such a transaction is a retail sale of a wholesale sale?

"A. We have always identified sales to so-called national account category customers, as a retail sale.

"Q. 42. Moving now, then, to sub-paragraph (d) of this same section which has reference to sales to fleet accounts at wholesale prices and I want, with respect to my question, for you to accept no part of this paragraph (d) as to which you find any variance between it and industrial practices, and would you tell me, please, sir, whether or

not sales to fleet accounts at wholesale or any other prices, are recognized in the industry as retail or wholesale transactions.

1073 "A. Sales to fleet accounts, irrespective of size, are strictly recognized as a retail sale.

"Q. 43. If you would pay attention to the body of sub-paragraph (d), reference is made to certain wholesale prices and comparisons between certain prices for passenger car tires for resale, and truck tires for resale; reference is further made to accounts which operate more than ten commercial vehicles; and my question is, sir, whether or not the observance of certain distinctions between prices at which the product moves, or certain distinctions based upon the number of vehicles operated by the purchaser, have any relevance or significance in the practices of the tire industry as you know them.

"A. Any sale to any fleet account, and we sometimes call them commercial accounts, common carriers, and so forth, are strictly retail sales by dealers.

"Q. 44. Moving on now to sub-paragraph (e) of the same section, which refers to sales on a tire rental service on a mileage basis known in the trade as 'mileage contracts', which is further there described as a leasing arrangement. My first question with regard to that sub-paragraph, Mr. Hedlund, is whether or not according to your knowledge and experience this kind of a

1074 mileage contract is a common or a rare type of transaction for the typical tire dealer.

"A. Mileage contracts are a rarity at dealer levels, and I only know of one small one right here in Chicago. And the dealer who handles it, incidentally, certainly classifies it as a retail sale.

"Q. 45. Is the classifications by that dealer in that instance of this mileage contract arrangement as a retail transaction, will you state, please, sir, is that in accord with the recognition in the industry as you know it?

"A. Yes. I think any time a dealer has a mileage contract, or what we also know as a cost per mile or rental contract, that this is always recognized as a retail sale.

"Q. 46. With reference to sub-paragraph (f) of the same section of this exhibit, which refers to:

'Sales of servicing and repair work performed under a fleet maintenance arrangement on tires for trucks and other automotive vehicles whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price'.

1075 And in context that sale of services or repair work is classed by this bulletin to be wholesale, that is, non-retail business. My question is, would that kind of service or repair work be recognized in the tire industry as retail or wholesale business?

"A. This type of work and service is still strictly a retail sale according to common practice.

"Q. 47. The phrase is used in the same sub-paragraph (f) 'the prevailing retail price'. I will ask you Mr. Hedlund, based upon your knowledge and experience in the marketing and merchandising of tires, what if anything the phrase 'prevailing retail price' connotes as applied to the tire industry?

"A. I don't want to be facetious, but there is no such a thing as a going retail price.

"Q. 48. Now, then, moving on in the same exhibit and on the same page before referred to, to Section 779.375, if you would look, sir, you will find the statement:

'An establishment engaged in the retreading and recapping of tires is recognized as a retail establishment in the industry if it does not derive from the sale of tires retreaded or recapped for sale, more than 50

1076 percent of the annual dollar volume of its sales resulting from its retreading or recapping operations'.

My question, Mr. Hedlund, with reference to that language, is whether or not this break-off point at 50 percent is in fact recognized in the tire industry as a determinative criteria to identify or segregate retail establishments from non-retail establishments, or from any other category.

"A. This is the first time that I have ever seen any percentage used with what we call a retreader, and there are approximately ten thousand in America. A retreader sells and services retread tires, and again this is strictly a retail classification. It is a retail sale.

"Q. 49. I believe I understood your answer to be that the 50 percent level mentioned in that part of the bulletin from which I have just read, does not to your knowledge have any significance in the industry.

"A. None at all.

"Q. 50. Mr. Hedlund, as a matter of fact I am sure you know that the bulletins and regulations from which I have read and to which I have just referred in the last several questions, came out in approximately the
1077 same form as those from which I read and have been of record now for, well, let's say in round figures two years or more. And my inquiry is directed to what, if anything, your local Chicago Tire Dealers Association or some of its individual members may have done when such regulations and directives were first brought to its or their attention, and if they did nothing, why did they fail to do anything about these regulations?

"A. I think my answer is very simple. Virtually every employee, outside of sales and office employees, belong to unions in Chicago. And this has been true for possibly twenty-five years. Our basic hourly rates, just as a matter of interest, currently at the lowest level are over $2.00 per hour. Therefore, we do not get too excited about wage regulations, in view of the fact that we are in what you might call a rather high labor base rate area.

"Q. 51. From your fairly extensive travels to appear before tire retailer associations in various parts of the country, could you tell us, Mr. Hedlund, whether or not there are other areas in addition to Chicago where the labor market or situation is such that the minimum pay for employees in such areas exceeds the minimum pay as enacted by the wage and hour legislation?

1078 "A. If I understand the question correctly, taking California as an example, are they confronted with this minimum wage——

"Q. 52. Will you answer my question first?

"A. ——problem.

"Q. 53. Yes. My question first is, whether or not from your travels and appearances before tire dealer organizations in several parts of the country, are you familiar with the going wage rates in such different parts?

"A. Let me say this, that I exchange wage rates with association secretaries across the country, and I notice that when I look at them, particularly geographically below the Mason-Dixon line, that they are much lower than ours here in Chicago, or those in California.

"Q. 54. Well, did you perhaps intend to refer to this Mason-Dixon Line, with which we are all familiar, as being a sort of a dividing line between the higher and lower wage rate areas?

"A. I think this is basically the way we in the industry think. Having traveled in those areas, we sometimes envy the labor rates that some dealers pay. However, we are realists who know that geography plays a big

1079 part in labor rates, not only in our industry but in many other industries.

"Q. 55. Could you tell us, sir, whether or not a comparison could be made on this basis, that north of the Mason-Dixon Line, and from what you said I take it also on the West Coast, the going wage rate for labor, unskilled type

labor, exceeds the minimum as set by federal legislation, whereas south of the Mason-Dixon Line it may not exceed the minimum set by federal legislation?

"A. That would be my observation, that as we go into the south that we notice that those labor rates are lower than we who live up north pay our skilled or unskilled labor.

* * * * * * *

1080 By Mr. Mitchell:

"Q. 58. I presume, Mr. Hedlund, that in that by-play you may have lost track of the question. It would be understandable if you did. My question was directed, sir, to the geographic spread of unionization or organization into labor unions of tire dealer employees on a geographic basis, if such basis exists in fact, and I would like to know what that geographic basis is.

"A. I might say this, as I travel through the so-called southern states of Alabama, Mississippi, Tennessee, Georgia and Florida, I can't recall hardly a single instance where the employees of the independent dealers were union members. I could be wrong with that observation, but this is an honest statement.

1081 "Q. 59. Now, what has been your experience with regard to the employees of the tire dealers in other parts of the country? You have already indicated that there has been organization of such employees in the Chicago area for many years. Have you encountered it generally in other areas than those you just named which encompass part of the southeast of the United States?

"A. Yes. Employees of Cleveland tire dealers, Minneapolis, Los Angeles, San Francisco and in Denver, to the best of my knowledge, are completely organized in the unions.

"Q. 60. From whatever exchange of information there may be between yourself and persons of corresponding

responsibility in tire dealer associations in other parts of the country, or from your observations or discussions during your travel to other parts of the country, can you tell us, Mr. Hedlund, whether or not as a general thing the bargaining agreements struck by union representatives of tire dealer employees, where such employees are organized, exceeds or is less than the wage rates set by the federal labor legislation?

"A. They are far beyond the wage rates set by the government.

"Q. 61. May I interpolate to construe 'beyond' as being in excess of or greater than?

1082 "A. In excess of. In fact, almost double.

"Q. 62. What, if anything, do you know with regard to the additional records that must be kept by employers with regard to its employees where there is a unionization or organization of those employees, and my question, of course, has specific reference to the tire dealer employer.

"A. Every dealer, particularly where he has union help, has time clocks or cards that are signed, and very accurate records are kept on every employee, particularly due to penalties that we might incur by not paying for overtime, or any violation of our union agreements.

* * * * * * *

**Cross-Examination,**

By Mr. Tincher:

* * * * * * *

1095 "Q. 48. I take it, Mr. Hedlund, that in your asso-
1096 ciation with the tire industry, and your position as editor of 'This Week in Tires', you also have access from time to time to published price lists put out by General Tire & Rubber Company, is that correct?

"A. In other words, if I want to go out and get a General Tire & Rubber Company price list, that I could

go say to a General dealer, or a General store, and they would give it to me.

"Q. 49. Is that true?

"A. This is true, I think that they would.

"Q. 50. And have you in recent months seen or examined any of the prices published by General Tire & Rubber Company?

"A. To be very honest, I don't think in the fifteen years that I have run this association, that I have ever had a General Tire Company price list in my files.

"Q. 51. I believe you have already stated, perhaps for the record but let me ask you, are you in any way acquainted with the Steepleton Tire & Rubber Company of Memphis?

"A. To the best of my knowledge I wouldn't know Mr. Steepleton if I saw him. Now, he may know me, as I said previously. I have not been in Memphis I don't think since World War II.

1097 "Q. 52. You are not acquainted with his operation there?

"A. I have no idea of his operation.

"Q. 53. Are you familiar with the price structures and other problems, operational problems of the tire dealers around the country?

"A. What do you mean, price structures?

"Q. 54. The prices at which they sell their products.

"A. I don't think there is a person living that would know what dealers sell at. I mean, there is no uniform price in the tire industry.

"Q. 55. Well, would you say that the price level published here in your weekly publication and set forth on Exhibit 2 to your deposition, is that representative of the prices that are in use at the present time?

"A. Well, this is in an area that is perhaps basically used in what we call 110 level tire, a first line 100 level tire, second line tire and third line tire.

"Q. 56. The published prices then are comparable, with reference to the different manufacturers who put out tires that fall into these categories, are they not?

"A. Well, they used to be comparable, but since November 1st and January 1st, there is a great area of
1098 difference between all of these, both list prices, code prices and so forth.

"Q. 57. My questions then will relate to the period prior to November, 1961. Specifically, I should like to have you think in terms of prices during the year 1960. Now, from your acquaintance with the industry, were the published prices generally pretty much the same for different manufacturers?

"A. From a list price standpoint they were pretty much the same, depending now again on let us call it the equipment type of manufacturer and the non-equipment type of manufacturer.

"Q. 58. Yes. And General Tire & Rubber Company, for example, was an equipment type of manufacturer, was it not?

"A. Yes. But let me add this. I think this is news worthy, or at least of interest. The General Tire & Rubber Company had list prices and dealer costs, and so forth, higher than the average tire supplier.

"Q. 59. Well, it is the smallest of the Big 4, as I understand it, is that correct?

"A. You are right up to date because they just passed Goodrich this year, number 4 in total dollar annual sales.

"Q. 60. Well, in 1960 would they have been fifth?
1099 "A. Fifth in 1960, but they went into fourth position, I understand, in '61.

"Q. 61. In your earlier testimony you classified sales in only two separate categories, namely, retail sales and wholesale sales. I want to question you briefly in regard to

the wholesale classification. Would you explain again what you call the wholesale classification of tire sales?

"A. In the tire industry, the wholesaler sells to a dealer.

"Q. 62. And I believe you said that there is a middleman.

"A. That's what he is.

"Q. 63. Normally involved in a wholesale sale.

"A. This is what we ordinarily call a middle man, between the tire supplier and tire dealer. He is right in there in the middle called the wholesaler.

"Q. 64. Is that middle man in the tire industry normally independent of the manufacturer?

"A. I would say so.

"Q. 65. Does he normally have a large warehouse where he carries a sizeable stock of tires and other products which he sells to dealers?

"A. He generally is in a location that is not conducive to retail business. He is in the type of a building
1100 that we might call a warehouse facility for stocking merchandise.

"Q. 66. Are you familiar with the sales organization generally of the General Tire & Rubber Company, Mr. Hedlund?

"A. Well, now, are we talking about personnel, dealer stores, or what are you talking about?

"Q. 67. Well, my question relates to their organization setup for the distribution of tires.

"A. To the best of my knowledge General sells strictly to dealers, and they also have, and I could be a little bit wrong, about a hundred company owned stores of their own.

"Q. 68. Now, what I wanted to develop a little more clearly is the role of the so-called middle man in the General Tire & Rubber Company organization.

"A. Well, there may be certain parts of the country

that they might have a wholesaler that perhaps covers a county or two. This could well be, but I am not that intimately acquainted with their system of marketing or distribution.

"Q. 69. Are you aware that General Tire & Rubber Company makes sales directly to many of their customers?

"A. I am very conscious that not only does General do that, but just about every tire supplier in the industry.

"Q. 70. Among those customers are various vehicle
1101 manufacturers to whom General Tire & Rubber Company sells?

"A. That is what we would call original equipment.

"Q. 71. Yes.

"A. So-called, the Detroit category.

"Q. 72. Yes. And in addition to the original equipment tire customer, are you aware that General Tire & Rubber Company also sells in sizeable volume to so-called national account?

"A. This is a good assumption that they do, not only to national accounts, but to what we call common carriers, and so forth.

"Q. 73. Yes. And you are sufficiently acquainted with the industry to know that not only General Tire & Rubber Company, but the other manufacturers have a sizeable volume of this type of business.

"A. This is what we call direct selling, and this is a little bit of a bone of contention of the so-called independent tire dealer.

"Q. 74. Yes.

"A. He thought that this was his province, that he developed it, serviced it, and now he is circumvented occasionally by what he terms direct sales.

1102 "Q. 75. With reference to that type of sale and the other sales directly by the manufacturer, is there any place in this phase of the business for a middle man?

"A. Now you are going to ask a question to which I have to give you a personal answer, that the challenge in America today is to take the tire, or any product, and in the least amount of steps go from the shipping room platform directly onto the customer's wheels. These stop gaps, the wholesalers, the dealers, and so forth, is trying—there is an ambition to keep at least the wholesaler at a minimium, because he is going to always have to be reimbursed a certain percent for his inventories, his work, and so forth.

"Q. 76. Would it be correct to say then that the trend is away from the wholesaler and middle man step in the marketing of tires?

"A. I would say so, and then again I could be wrong, but this would be my observation.

"Q. 77. Is there any trade organization that you know about that is now active on behalf of the wholesaler and middle man group?

"A. Let me say this, I will go back to the so-called—or to the tire industry again. There are these so-called wholesalers still out there who sell and service what we call oil company stations, associate dealers, and so
1103 forth. There is still a percentage of them in America.

Now, to answer your other question, there is an association called the Automotive Wholesalers, I believe, and they are in more or less automotive parts piston rings, spark plugs, batteries, and so forth.

"Q. 78. Is there a comparable organization in the tire industry?

"A. I know of none that carry that identity.

"Q. 79. For comparison purposes, could you fill us in a little bit on the place in the automotive industry which is held by these wholesalers of automotive parts with reference to the distribution of tires?

"A. You say is there anything in the automobile industry?

"Q. 80. Automotive parts industry.

"A. There is automotive wholesalers.

"Q. 81. Yes?

"A. They are out there yet. Now, what was your question?

"Q. 82. Is there a comparable group in the tire industry, and if so——

"A. There are individuals and companies and what have you that are still in this wholesale category in the tire business.

1104 "Q. 83. With reference to the automotive parts industry, wouldn't it be true that in addition to supplying parts and replacement of parts to garages and dealers, that they supply automotive parts to fleet operators of trucks and automobiles?

"A. Now, I don't know enough about the so-called automotive wholesaler to give you an intelligent answer.

"Q. 84. Well, I suppose you are aware that many of the fleet operators of vehicles maintain their own repair garages, and as a part of those repair operations they would be buying replacement parts for motors and gears and various other parts of the operating mechanism, is that correct?

"A. That is correct.

"Q. 85. And my question then is, are you aware that such fleet operators are able to buy and do buy at wholesale prices from the automotive parts wholesalers?

"A. Again I have to plead a little ignorance, because I have not followed the so-called automotive wholesaler. My interest has always been strictly in the tire industry and TBA, and these other suppliers had no defined interest outside of casual.

"Q. 86. Well, as, of course, being experienced in
1105 the transportation industry, would you classify sales of automotive replacement parts, for example to fleet operators, at prices which are the same as the prices to a garage, for a piece of equipment to be used on some individuals automobile, where those prices are the same, would you classify the sale to the fleet operator as a retail sale or a wholesale sale?

"A. I still go back on a rule of thumb, or whatever you want to call it, that if somebody is selling something to a consumer or user, that that is a retail sale. You see, there is a lot of verbiage in every industry that has been carried along, wholesale and different things, that is very misleading, believe me.

"Q. 87. If the sale of automotive parts is made at a price comparable to that to a dealer and in quantities which are comparable to the sales of the dealer, would you, nevertheless, classify that as a retail sale?

"A. I still say that in America, where you sell something direct to the ultimate consumer customer, that that is a retail sale. And you are getting me in areas that I
1106 am not equipped to give you too intelligent answers, when you talk about automotive parts and things like that, because I immediately think of piston rings, spark plugs, equipment, and so forth.

"Q. 88. If I understood you correctly, you testified earlier that where the purchaser puts a tire he buys onto the wheel of a vehicle he owns, you consider that to have been a retail sale. Is that correct or not?

"A. You mean, say I drive a car into a dealer and buy a tire and it is put on my car, if that is a retail sale?

"Q. 89. No. My understanding of your testimony was not that restrictive. Perhaps I misunderstood, but I gathered that you were saying that if the tire is sold, one tire or any number of tires to a person who puts the tires

on vehicles which he owns, that is considered in your judgment a retail sale.

"A. That's right.

Mr. Mitchell: May I interrupt? For clarification I think the record should reflect, are you distinguishing in that question between the purchaser putting the tire on the vehicle as compared to the seller putting the tire on the same vehicle?

Mr. Tincher: There was no such distinction.

Mr. Mitchell: I wanted to be sure. I thought
1107 it might have been read into the question, and that is why I sought the clarification.

By Mr. Tincher:

"Q. 90. Then I want to ask you, Mr. Hedlund, would you make the same answer notwithstanding the fact that this purchaser of a number of tires is using the tires on vehicles which he intends to sell, specifically, for example, a used car dealer. Would that be a retail sale to that used car dealer?

"A. If the tire dealer sold a used car dealer a set of tires for his used car, this in my opinion is a retail sale.

"Q. 91. Now, Mr. Hedlund, with reference to the interpretative bulletin about which Mr. Mitchell asked you some questions, did you participate in any way in presenting material and arguments to the Department of Labor when this bulletin was being compiled?

"A. They never asked me for any information, I never received a questionnaire, or anything.

"Q. 92. Are you in any way familiar with the material which was submitted by the tire manufacturers and by the National Tire Dealers & Retreaders Association?

"A. No, I am not.

1108 "Q. 93. In response to Mr. Mitchell's question you stated that sales made pursuant to a formal invi-

tation to bid, sales to the state and local governmental units, would nevertheless be, in your opinion, retail sales.

"A. That's right.

"Q. 94. Are you familiar with the practice in the industry of various states publishing a state list price which the manufacturers then use in having their dealers make sales to state agencies?

"A. I am under the impression, I have not seen it for years, but it could exist, that there was so-called state government prices or local government prices. But again I could be— this is an area that I very seldom have any sort of intimate contact with. I do know that dealers, for instance here, will bid on the parts industry.

"Q. 95. Have you seen lists which are published by the tire manufacturers or by dealers which are termed state list prices?

"A. I have not seen one I don't think in fifteen years.

"Q. 96. Have you heard the term used?

"A. I have heard the term, but I have never seen the price list. I was not too much interested.

1109 "Q. 97. Yes. In the connection with which you have heard the term 'state list prices' would you classify that category as being comparable to the prices that are published or at which the tires are sold where an invitation to bid is issued by the State government, are those prices comparable? Would you consider them in the same category? Maybe I can make it a little more clear by saying, where the state requests tire manufacturers or dealers to submit bids——

"A. Right.

"Q. 98. ——for tires of certain specifications, if a state list is published then the tire dealers have the option of selling the tires to the state agencies at that list price, would you consider the transactions essentially the same?

"A. You mean a retail transaction?

"Q. 99. Without reference to whether it is retail or non-retail, would you consider the transaction essentially the same where the sale is made pursuant to an invitation to bid, or whether it is made pursuant to a published state list price?

"A. Well, all I know is that local and county and
1110 state governments will ask for bids on their tire requirements. Some tire companies will bid direct, sometimes dealers bid, and I never slowed down to see what they used as a basis for submitting their prices.

"Q. 100. All right. You also indicated that you consider sales to national accounts as retail sales. I assume that is because the purchaser is using the tires on his own equipment.

"A. Correct.

"Q. 101. I was hoping you would make a statement, because the reporter cannot get your nods.

"A. Oh. That is correct.

"Q. 102. Are you familiar with the procedure by which these national accounts are serviced by the various independent dealers across the country?

"A. I won't say I would be accurate. Some of them solicit bills, service, and handle the national account on their own. Sometimes perhaps they are asked to deliver and service a tire, and maybe the supplying tire company does the billing.

"Q. 103. Yes.

"A. And they are reimbursed in some form or fashion.

1111 "Q. 104. In your experience, then, the procedure is not uniform?

"A. No. There is a great variation in the handling of national accounts today.

"Q. 105. Take the situation where a manufacturer has a national account arrangement with a company such as

the Continental Baking Company, and in a particular locality the Continental Baking Company manager arranges to have the local dealer deliver a group of tires to him. There has been no prior purchase of that particular group of tires, only an arrangement whereby they will be furnished at a certain price.

Now, are you familiar with the procedure followed sufficiently that you can give your opinion as to where the sale of that group of tires is made and completed?

Mr. Mitchell: We, of course, will object to that both as to form and substance, and at least the objection as to form is pertinent and proper at this time.

Mr. Tincher: You may go ahead and answer now that counsel has noted his objection.

Mr. Mitchell: Under the rules by which these depo-
1112 sitions are taken, where I make my objection as to form and Mr. Tincher does not choose to restate, you are subjected to answer.

The Witness: National account sales are solicited by men known as being in the national account department of tire companies, as a rule.

By Mr. Tincher:

"Q. 104. Yes?

"A. They go out and solicit the business and quote prices. I don't know if contracts are written. And where and if necessary they need dealer stores or what have you to service this national account, they are notified to that effect.

"Q. 105. Yes. But you are aware, of course, that the arrangement between the manufacturer and the customer is simply one whereby the customer says, 'I will from time to time need tires in various places around the country where we have branch operations.'

"A. That's right.

"Q. 106. At that point, certainly, you will agree that there has been no sale of any particular tire.

Mr. Mitchell: We object to that question on the same grounds.

1113 By Mr. Tincher:

"Q. 107. You may proceed to answer.

"A. That there is no sale yet until the tire is delivered and serviced and mounted and then billed?

"Q. 108. My specific question was, you would agree that there has been no sale at that point?

"A. Without the delivery of the tire?

"Q. 109. Yes.

"A. That's right. No sale. Maybe a commitment, but there is no actual sale.

"Q. 110. Presumably under the circumstances I have just stated, the purchaser has not obligated himself to buy any specific quantity of tires, or perhaps any tires at all. Would you agree on that?

"A. Now you are getting into an area that I don't know too much about. What do the national account sales manager and their sales force, what do they say, what are the understandings of contracts, and so forth, this is a little bit far removed from any current knowledge of mine.

"Q. 111. In your experience, and we will not limit it to your current knowledge, Mr. Hedlund, but in your

1114 experience as division manager and assistant sales manager for the U. S. Rubber Company, for example, did you have any dealings with the national accounts served by that company?

"A. Now you are going way back to 1940, and I presume because the descriptive verbiage of national accounts has been in the industry I think from the day I stepped into it in 1923. I again could be a little bit wrong on the date and the year on that.

"Q. 112. Well, you did have a position as assistant sales manager during World War II, did you not?

"A. Yes, but this was on military tires.

"Q. 113. And military aircraft?

"A. Yes.

"Q. 114. Just incidentally, were those considered to be retail sales when you were selling to the government as the consumer? On the tires.

"A. Now, let me say this. During the war times, and you will recall we were out of tires, we were out of crude rubber, dealers were selling retreads made out of ersatz material. So this would strictly be a direct sale by a tire company to a government agency during the war. I don't think, unless there were real exceptions, that you would put that into a retail category at that time.

1115 "Q. 115. Would it be different now? I assume that tire manufacturers are still selling automobile tires and airplane tires to government agencies.

"A. That's right.

"Q. 116. How do you classify such sales today?

"A. It is a direct sale to a tire company.

"Q. 117. To a consumer, the United States government.

"A. I think you have to finally put Uncle Sam in a little separate category, and not really call him a consumer.

"Q. 118. Would you have a different category for sales to the federal government than you have for sales to state government?

"A. A little bit, I think. And again I may be a little bit hazy now on what constitutes a sale to the federal government. But I do know that a sale to the State of Illinois, if a dealer handles it, this could well be a retail sale.

"Q. 119. Is it considered a retail sale in the industry?

"A. When a dealer handles it, it is. I mean, there is no other category that is logical where it would fall.

"Q. 120. You are aware that independent tire dealers do supply tires to agencies of the United States
1116 Government too, are you not?

"A. Well, what type of agencies? Like——

"Q. 121. General Service Administration, Post-office Department, United States Marine Corps.

"A. Yes, this could well be, particularly in the retreads this happens, by independent dealers.

"Q. 122. And new tires too?

"A. It could be.

"Q. 123. And my question is, in your opinion, in the field of tire marketing, are such sales retail sales or wholesale sales, or some other category?

"A. Well, I would rather say that this now comes into a category that really, to be very factual, is neither a retail sale nor a wholesale sale. Maybe we ought to call this now a sale to the government agency.

"Q. 124. Then if we do make a third category which you term sales to a government agency, would you place only sales to the United States government in that category, or would you also include sales to state governments, sales to city governments and sales to county governments?

"A. I would confine that strictly to the government, because when you are selling to local or state gov-
1117 ernments, sometimes there is a lot of not only the sale and delivery, but there is mounting, and so forth, and I think somewhere there has to be a little cleavage in the classification.

"Q. 125. Then you would limit that category to sales to the federal government?

"A. I would. This is strictly personal.

"Q. 126. I want your opinion as an expert, Mr. Hedlund.

"A. Yes. Thank you.

"Q. 127. You spoke of classification of sales which you termed commercial sales. Would you elaborate on that just a little bit?

"A. Yes. Commercial, in the early days of the industry, everybody that had a truck, one, two, three, four, five or a fleet of them, was called a commercial account. This was sort of called commercial account selling. And again this was basically truck tires contrasted to passenger tires, as of the average car owner.

"Q. 128. Yes.

"A. But still a retail sale in my book.

"Q. 129. These commercial accounts expected to buy at prices lower than were charged to the general public, did they?

"A. Well, this is America, this is if you buy more of something you are supposed to get a better price.
1118 This is a theory that has sort of gone hand in hand with selling to so-called commercial accounts.

"Q. 130. And the practice grew up in the industry, I believe, to give them a greater discount from the list price than the average person would be able to get?

"A. This is true. I mean, this makes a little bit of sense, because on the one hand you may be dealing with a $20.00 unit tire sale to the car owner, and take a ten or a twenty on the truck is a $100.00 unit sale.

"Q. 131. Yes. So on the list price for the $100.00 unit sale, particularly if it was a fleet account, a greater discount would normally be given than would be given to the individual buying automobile tires.

"A. This became a sort of accepted practice of custom.

"Q. 132. And that practice was had, was it not, with reference to fleet owners of trucks as distinguished from

an individual owner of one truck, even though the size and type of tire would be the same in either instance?

"A. Yes. This is an unfortunate thing that the size of the fleet determined the better price. And we call fleets, some call them ten or more trucks, some
1119 might call them fifty or more, or a hundred or more.

"Q. 133. Did the practice develop that the fleet account would be applied even to the five or more vehicles?

"A. Here in America it went down to one. Sometimes a fellow with one truck could buy truck tires just as cheap as the fellow who had ten or twenty or fifty.

"Q. 134. But that would have been the exception to the rule?

"A. This would be the exception.

"Q. 135. And the fleet practice of selling at greater discounts to the owners of five or more vehicles spread to the passenger tire sales as well as the truck tire sales, did it not?

"A. No, I wouldn't agree with that statement. The only thing that we did at so-called passenger car level, we bought two tires instead of one, or bought four instead of one, or four instead of two, you got a little better unit price than when you bought them singly.

"Q. 136. Yes, but what I had reference to was the salesmen's cars, for example, that were furnished by a manufacturer or a wholesaler. If that manufacturer or wholesaler operated a fleet of ten or more passenger
1120 automobiles for use by the salesmen, he would be given a unit price lower than the unit price to an individual car owner.

"A. This could be a good assumption. Now, whether you are right on the number of units where he finally got a little better break, could be a moot question. But again this gets back to a fleet in numerical units, and so on.

"Q. 137. Whatever the numerical point at which the

differential applied, that was a recognized practice in the industry, was it not?

"A. In other words, he may call in and say, now, this is a national account.

"Q. 138. Well, I am trying to keep this distinguished from national accounts.

"A. Yes, but it is hard to do.

"Q. 139. In the fleet account business that is handled by the independent dealer, is it not true that the practice grew up and was recognized in the industry that the fleet account of multiple units of passenger vehicles would get greater discounts on the tires that they bought for those cars than the individual car owner would be able to get?

"A. I think this is a proper assumption. Either competition did it, or something did it.

1121 "Q. 140. I am trying to establish whether or not it was more than an assumption. Was it not an actual practice which, although there may have been exceptions, was well recognized in the industry?

"A. I think that an organization like that would have a purchasing agent, and he would call a dealer or a tire company in and say, now, I have fifty salesmen with fifty cars and they run around the United States, and I want to be sure that I am getting a good tire, good service, and a good price. I think naturally the evolution of that is perhaps the purchasing agent won over the individual car owner.

"Q. 141. With reference to so-called mileage contracts about which Mr. Mitchell inquired, are you familiar with the practice which has developed in some areas of guaranteeing that recapped tires will provide a certain mileage and, to be more specific, the practice of selling those tires with a guarantee that one mill per mile will be the maximum cost?

"A. In other words, that the supplier or dealer says I

will put these tires on, I will retread them and your cost will be, as you say, one mill per mile?

"Q. 142. Not to exceed that. Are you familiar with such practices?

1122 "A. Oh, I am familiar with this, which is called mileage rental, whatever you want to call it, mileage contract.

"Q. 143. Yes.

"A. But again let me quickly say that you are now in an area where very few tire dealers today handle the mileage contracts business.

"Q. 144. The reason I am pursuing this, I will state for the purpose of orientation, the president of Steepleton Tire Company testified that, at least with reference to some of his accounts, he sells his recapping business on such a basis, guaranteeing that the cost of recapping the tires will not exceed one mill per mile. Now my question is, where the mileage guarantee arrangement is used by dealers, is it the general practice of such dealers to provide an inspection service and free airing and switching of tires, and so forth, in order to get maximum mileage from those tires?

"A. This would just be good business. If, instead of selling for X dollars for the tire, if you are going to do that on a so-called mileage or rental basis, that you occasionally send your service man around and see that the proper pressure is there, that there is no misalignment, that the brakes are grabbing.

1123 "Q. 145. Yes.

"A. I think any good sound business man would have that as part of his program.

"Q. 146. And the two procedures normally go hand in hand, do they not, if there is a mileage guarantee on the tires, then the dealer will make periodic examinations in servicing and see that the tires are properly mated, prop-

erly inflated, and otherwise being properly used and not abused in order that the mileage can be realized?

"A. This would be good practice. Unless the mileage account had a very good service manager whom he had complete confidence in and was sure that performance were kept up, misalignments caught, and so forth. So this is a two-way proposition. I am not going to sit here and say that where they have mileage they all give this service. However, if I was personally a tire dealer and had an arrangement like that, I think that I would periodically inspect my tires to see that I am getting the expected mileage and service out of them.

"Q. 147. In your position as an executive secretary of the Chicago Tire Dealers Association, do you maintain contact with the recapping business, and acquaint-
1124 ance with the recapping business done by your dealers?

"A. Now, for this reason, that many dealers are automatically or simultaneously in the retread business, which is a matter of economics, because this phase of the tire business has been rather decent on the gross profit recovery where well managed.

"Q. 148. Generally speaking isn't it true that the tire dealers realize a higher margin of profit on the recapping business than they do on the new tire business?

"A. Yes, this is a good assumption and I hope it is true, because in our solicitation of all types of tire business and in the competitive strain, that if you have a retreading plant and manage it properly, this can be a higher gross profit than even selling new tires.

"Q. 149. Yes.

"A. This is a matter of history and experience.

"Q. 150. Now, I have been using the term 'recapping' and I notice that you use 'retreading'. Are the terms interchangeable?

"A. Both are synonymous.

"Q. 151. Yes. With reference to fleet repair and servicing work about which Mr. Mitchell inquired, I believe you stated that there was no such thing as a going retail price. Would that represent your answer?

1125 "A. You mean a stabilized price structure to fleets?

"Q. 152. Well, perhaps. Is that what you intended?

"A. This is what I intended to say, that nothing is frozen in the marketing of tires. One day a purchasing agent may get this kind of a price, and tomorrow somebody comes along and lowers it. There is no stability really in a so-called price structure. And this goes true for passenger car tires. You see, we have—and now again, I don't want to expound, but there must be plenty different type of retailers in America where you can go in and buy a tire. We just had three new ones come in. As a matter of record, in the last year or eighteen months we had discount houses, we had food chains, and we have now seen a revitalization of department stores going into the tire business.

"Q. 153. In other words, the competition seems to be getting keener, is that right?

"A. This is correct, the keenest I have seen in just about forty years in the tire business.

"Q. 154. But in reference to the business being done by independent tire dealers in the field of fleet repair and servicing of tires, would it be correct to say that the prices charged for the recapping of such tires of fleet

1126 operators by and large is a lower unit price than that charged to the operator of a single truck?

"A. This is a good assumption. I mean, if you are going to retread one tire for a customer and you have another customer that has twenty, and you keep your molds hot and everything else, and you pick them up and deliver them, whatever you do, that that fellow who is

giving you twenty tires to retread is going to get a lower price than the single fellow, the operator with one truck tire to be retreaded.

"Q. 155. In your position as executive secretary of the Chicago Tire Dealers Association, have you endeavored to advise the dealers from time to time what the requirements are with reference to wages, and records to be kept, and so forth?

"A. Oh, sure. I sit down with our attorney and what we call the labor union committee of my organization, and we negotiate with the unions. And this takes months. We finally arrive at a contract or agreement, and we generally make say a two year contract.

We will say, "All right, we are agreed that in 1961 we are going to give you ten cents, the members ten cents an hour increase, and in 1962 seven and a half cents an hour." And this is just a fact. I have just bulletined
1127 my members "Don't forget, on January 1st, all members of Local 82 get seven and a half cents an hour increase, due to our agreement with the unions".

Again let me state this, while we as an association, rather than negotiate, these contracts are individual with the members.

"Q. 156. Are you aware that interpretive bulletin 779 which set forth the percentage referred to in section 779.375 about which Mr. Mitchell inquired, that percentage was published and set forth as early as 1958 by the Department of Labor?

"A. Which percent? Is this the one here, 50 percent?

"Q. 157. 50 percent, yes.

"A. All I can say is, and I have been around a long time, I would like to know who can arbitrarily pick a percentage of business and then start to classify it.

"Q. 158. But you had not seen that percentage at any time——

"A. No, sir.

"Q. 159. ——before Mr. Mitchell inquired about it?

"A. No, sir.

"Q. 160. You testified about the rates of pay among employees in the Chicago area exceeding the minimum rates prescribed by the Fair Labor Standards Act.
1128 It is the practice and has it been the practice in this area to pay over-time after forty hours?

"A. Oh, yes. We absolutely—this isn't only a union directive, but I think it is almost some sort of wage and hour law, that after forty hours you get time and a half.

"Q. 161. That is correct. And your members in this area have been complying with that, whether or not because of the union activity, but at any rate they have been paying time and a half after forty hours, is that correct?

"A. I hope they have. But I will say this, we are solid business men, we are into the second generation here with some of our tire dealers, we try to stay with any law whether we like it or [illegible]. We are quarreling with the 4 percent sales tax, we think it is high, but as long as this is the law, our members keep the records, reimburse whatever government agency it is, and live completely within the intent of all laws.

* * * * * * *

**Redirect Examination,**

By Mr. Mitchell:

"Q. 1. Mr. Hedlund, you were asked to describe the
1129 significance of presentation on the front page of your Exhibit 2, which is 'This Week in Tires' issued for January 8, 1962, the upper part of the first page of which has certain price lists under different classifications or headings. My question is, Mr. Hedlund, whether or not when you published that you intended to convey

the information, or whether you had a belief that prices were actually paid for tires shown on that list at the prices shown on that list and none other. That is, whether the information at this place on the exhibit reflects the prices in the market place or simply some list price.

"A. All I was intimating is that this is more or less a pricing structure which is a complete reversal of what we were used to up to November 1st. In other words I was showing that there is a lower list price, that the differential between a white and black, which was normally 22 percent, now has variations, that manufacturers have different code prices, and so forth. This was merely an overall informative cross sectional picture of four lines of tires.

"Q. 2. But my question is, sir, does the chart which is on your Exhibit 2, represent the prices that were actually paid for the tires there described in Chicago, or
1130 Omaha, or any given place on or about the date January 8, 1962?

"A. Paid by whom?

"Q. 3. By the purchaser.

"A. The retail customer?

"Q. 4. Yes, sir.

"A. I should live this long that these prices are accepted across the market. This is merely showing suggested prices, and what have you.

"Q. 5. I take it from the way you have answered my question, that the actual prices paid in the market place at different points in this country varied widely?

"A. Yes.

"Q. 6. And I suppose irregularly?

"A. That's right.

"Q. 7. From the price structure described on your exhibit?

"A. I just wish that independent dealers could get

these prices, in view of the competition that is out there in various forms, shapes, and what have you.

"Q. 8. And then, Mr. Hedlund, you were also examined by Mr. Tincher, as to what the term 'commercial sales' meant, and you were asked in connection with that whether or not a greater discount might be allowed
1131 on sales of truck tires to owners of fleets, of several vehicles, than would be allowed to the owner of a single truck. And my question is whether or not as you understand the recognition in the industry, the sale to the owner of the single truck or the sale to the owner of several trucks at whatever discount, would be any less a retail sale.

"A. No, this has nothing to do with the identity of the class of the purchaser. He is still a retail customer in my eye, and I think to a lot of people that have been around the industry, this is still a retail sale.

"Q. 9. And by the same token you were asked to make certain assumptions and draw certain conclusions with regard to the discount that might be allowed to the owner of a fleet of fifty, or some large number of passenger cars used by, for example, salesmen of a given manufacturer, and I believe your testimony was that competition and market trade practices being what they are, the owner of several passenger cars might well purchase passenger tires at a greater discount than is normally allowed the owner of a single passenger car. Again my question, Mr. Hedlund, is, does that make the sale to the owner of the fleet of passenger cars any less a retail sale?

"A. He is still in my book, in the category a retail customer.

1132 "Q. 10. Is that also your understanding of the recognition of the practice and the definition in the tire industry?

"A. Yes. We—again I don't want to be repetitive,

but I have been around as long as most people that are still around in this tire industry, and we have only had really two classifications and what have you, retail and wholesale.

"Q. 11. You were also asked to make the same assumptions and reach certain conclusions with regard to the difference in the prices that might be charged for recapping services where the recapping was to be done on the tires and presumably all of the tires for the owner of a fleet of many trucks or vehicles, as compared to the price charged for recapping of the tires on a single vehicle. My question is whether or not the difference in the price for such recapping service enters into the classification of that service as a retail sale.

"A. Now, this fellow is still a retail customer in my book. His ability to get a better price because he has twenty or fifty units does not put him into another class. And I still have to tell you that I will only still recognize basically two classifications of customers, one is a retail customer and the other is a wholesale customer,
1133 regardless of who he is, or what he operates or what have you. This is the way for years that this business goes into the independent tire dealer's books.

"Q. 12. That leads me to my next question, sir. There was some discussion under your cross-examination concerning direct sales by a manufacturer of the tire for example to governmental agencies, that then you get into a situation completely outside of this two part classification which inherently applies exclusively to transactions by a retailer or independent tire dealer.

"A. Yes. To the best of my knowledge at the federal government level, and I am speaking in terms of Washington, D. C., in bids on particular new tires, I have never seen where a dealer ever got that business. Again, I could be wrong. The independent dealer can still get

the Park District business here in Chicago, he can still get the State of Illinois tire business, and I still say when he does that, this is a retail sale in his records and the way he thinks about it.

Mr. Mitchell: I believe that is all.

**Recross-Examination,**

By Mr. Tincher:

"Q. 1. One of Mr. Mitchell's questions brings up
1134 this point, Mr. Hedlund, if sales on new tires are made to a fleet account, in your experience does it sometimes happen that the fleet account will buy a considerable number of tires at a particular time and place a part of them in stock to be used as the need arises?

"A. This happens. In his own stock directly?

"Q. 2. Yes.

"A. Yes. Let me show you how this happens. You come to December and he has got a budget and he wants to use it up. He may call a dealer tire company and say 'I want fifty tires'. He may not use them for sixty or ninety days, but he will pay for them in December, but still hold those tires. This can happen, and this is one of the quirks of corporations and of American business.

"Q. 3. It is not unusual, in other words, for them to order the stick?

"A. No, and he will hold them.

"Q. 4. And even though some tires might be purchased in lots of fifty or more, you would still consider it a retail transaction?

"A. Yes.

"Q. 5. Would you still consider this a retail trans-
1135 action if this particular purchaser, after buying a lot of fifty tires, could turn around and sell twenty-five of those tires to some other operator, because he was able to make a little profit from him?

"A. This could happen. This is very unusual that a so-called vehicle operator buys merchandise and then tries to make profit on it from a brother commercial fleet operator. Again this could happen. Maybe they need money to pay bills. Maybe tires went up. This is within the realm of actually happening.

"Q. 6. Yes.

"A. But rarely.

"Q. 7. And when it does happen, do you still consider that it was a retail sale to that fleet operator?

"A. Because the dealer who has sold them, sold them in true conscience, never thinking or dreaming that these tires would again be resold a second time. I think those cases would be so rare that you would have to dig deep to find them. But again I will tell you, in America it could happen.

"Q. 8. Yes, sir. Are you familiar with that phase of the industry which supplies tires to airlines, to owners and operators of fleets of airplanes?

"A. Yes.

1136 "Q. 9. Are any of those sales made by dealers?

"A. Yes.

"Q. 10. Or are they made by the manufacturers?

"A. In the majority, made by manufacturers. But there are certain specialists in America that will sell new airplane tires to these airlines, and there is about three big retreaders in America that have specialized on re-treading airplane tires for our commercial airmen. This has become very big business. If you know anything about airplane tires, there are so many landings that you make, particularly with the jets, that the treads are scuffed out. But we have some specialists in airplane tires and airplane tire retreading.

"Q. 11. I take it that is a rather highly specialized business.

"A. Oh, yes. I only know of three of them, one in Atlanta, one in Oakland, California, who has three set-ups across the country, and there is still somebody else who is sort of an airplane tire retread specialist.

"Q. 12. Now, do you classify that business as retail business?

"A. I would. Sure, this is a customer, because when he sells those tires they go on the airplane vehicles, or his retreads do.

"Q. 13. From your experience in the industry, do
1137 you have an idea what the percentage of gross profit on sales of new tires is required for a successful dealer?

"A. I can tell you what I think is ideal, and this would be Utopia. And this is the problem: If you watch—and now we have to get out of the tire industry—on any commodity, the gross profits are down and expenses are going up in America, and I have some very good ideas of what are good gross profits today. If you are going to ask me a pointed question like that, and this could be Utopia, if you want an answer.

"Q. 14. I would rather have a practical answer, Mr. Hedlund, one that is realistic and what the experience in the industry indicates is the margin of gross profit to enable an independent tire dealer to continue operating at a profit.

"A. Yes, and I hope I am not quoted, but this is really nice, that if you can come up with 30 percent gross profit on passenger tires, 18 percent gross profit on truck tires, and 40 percent gross profit on retreading. Now if you can have a mix like that and control your expenses, you can still make money in the tire business. Now, there will be many tire dealers who will say, 'Hedlund, I think you are crazy'.

1138 "Q. 15. With reference to the talks you have made at various conventions of tire dealers and other

meetings, have you made it a practice to advise them with reference to the requirements of the wage and hour law?

"A. No, these are areas that I think are confined to me locally here, and I am generally talking on marketing the product, technological changes, and things like that, new competition.

I rather—perhaps I am a little lazy, and I will say, 'Now, if you want to know about wage and hours, why don't you ask for Mr. Marsh, the executive secretary of the National Tire Dealers Association, he is in Washington, D. C.' These are areas that frankly I don't get into.

"Q. 16. Now, at these functions is it usual for Mr. Marsh to be in attendance too, and if so, in those instances where you have been at such a meeting where Mr. Marsh is present, has the wage and hour law been discussed among the dealers?

"A. Well, I would say that I have heard him discuss it. Maybe briefly I am going to look right here, here in his issue and his speech from Cleveland. Let's see if he mentions wage and hours. I doubt if Marsh covered it here in his keynote talk at the National Tire Dealers
1139 Convention in Cleveland.

"Q. 17. My question was, at various times have you heard him discuss it and explain the regulations of the Department of Labor with reference to wage and hour?

"A. Let me say this. I have read it in the National Tire Dealers Association Dealer News Weekly.

"Q. 18. Yes?

"A. There has been a lot of publicity, and he has put down the facts of life, and he published, if my memory is good, the $1.15 an hour minimum, and so forth.

"Q. 19. Yes.

"A. He has been very good in publicizing the releases.

"Q. 20. In general have you found that Mr. Marsh has advised members of the association to follow the regula-

tions as set forth in the Department of Labor interpretative bulletin?

Mr. Mitchell: Well, now——

The Witness: This—I could say I don't know, because, again I read a lot of magazines, and whether he has or has not, I don't know. The only way you could know that is to ask Mr. Marsh, or ask for his publications or copies of his speeches.

1140 By Mr. Tincher:

"Q. 21. Well, at the various conventions or meetings you have attended, do you recall whether there have been discussions of what constitutes wholesale sales and what constitutes retail sales in the industry?

"A. I have got to tell you that to the best of my knowledge there has never been any discussion of this classification. Again, basically while we have some splitting of whether they are part retail and part wholesale, the bulk of independent dealers in America today are concentrating in the retail market. Now, they may have a little X percentage of wholesale. Again, you may find the fellow who is strictly wholesale 100 percent right down the line. But again, numerically I have got to tell you that he is not in big numbers in the tire industry. His days could be numbered.

"Q. 22. In actual practice the terminology used in the industry has been that of dealer sales and consumer sales, isn't that right?

"A. That is correct.

"Q. 23. And the discussion within the industry itself normally does not use the terms wholesale sale and retail sale, isn't that correct?

1141 "A. Well, no. We are more acquainted with, we are going out for the consumer dollar, or we are going out to sell what we call associate dealers.

"Q. 24. Yes.

"A. Dealers sales. May I say that there is very bad verbiage in the description there of these things. Whoever wrote it up, why they didn't call on somebody to give them a little better guidance and clarification, and so forth. Maybe they did.

But again, let me say this, I will be only too happy at any time, if I am supposed to be some sort of authority in this industry, and I think I am beholden to no one, to come to Washington and help them write some of this verbiage.

"Q. 25. Thank you.

"A. This I think as a good citizen I would like to do.

"Q. 26. Thank you, Mr. Hedlund. While I cannot speak for the Department of Labor in Washington, I believe they would be interested in your views and the information you could give them, but would it be correct, and this I am not trying to belabor the point, but would it be correct in your estimation to differentiate the classes of sales on the basis of consumer sales and dealer sales, rather
1142 than in terms of wholesale sales and retail sales?

"A. Yes, I like this classification better than the one that is printed in here, in trying to differentiate between wholesale selling and retail selling. I think your terminology is more understandable at dealer levels, and even at industry levels.

"Q. 27. And as a person who has had a great deal of experience in the marketing of tires, don't you recognize that there is a very strange relationship of the term 'retail' in connection with fleet sales of merchandise at discount prices?

"A. Yes. In other words, to be honest, we think of a retail sale, we associate it with the department store, and what have you. I mean, this is an accepted classification in America. But again, in our tire industry it is a retail sale whether he has a car, whether he has a truck, or what

he has, as long as he is buying the tire from the dealer and putting it on the wheel. He then becomes in my book a retail customer.

"Q. 28. But perhaps more descriptive a consumer type customer?

"A. Yes, consumer.

Mr. Tincher: That is all.

Mr. Mitchell: No questions.

* * * * * * *

1146 **REBUTTAL PROOF.**

Thereupon the Government, in rebuttal, introduced evidence, as follows:

**DR. ROBERT C. BROOKS, JR.,**

the next witness, having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. You are Dr. Robert C. Brooks, Jr.?

A. That is correct.

Q. And I believe the "Doctor" pertains to the Doctor of Philosophy degree which you hold?

A. That is correct.

Q. Where are you employed, Dr. Brooks?

A. Vanderbilt University, Nashville, Tennessee.

Q. And what is your present position there at Vanderbilt University?

A. Assistant professor of Business Administration.

Q. Have you recently been advised that that position is to be improved somewhat, starting with the next academic year?

A. Yes, I have been promoted to Associate professor.

Q. I have a sheet here which contains some bio-
1147 graphical data which you prepared at my request, or at least handed me—I don't know when you prepared it—but would you read from that sheet and give a rough idea of your teaching experience and other professional experience, please, sir?

A. I have a Bachelor of Arts with honors from University of Chicago, which I received in 1946. I received the Master of Business Administration degree from University of Chicago in 1951, and I received the doctorate from the Graduate School of Business of the University of Chicago in 1960. And I was a Ford Foundation Doctoral Dissertation Fellow while I was working on my doctorate.

Teaching experience largely consists of the position of Assistant professor of Marketing at the University of Georgia from 1954 to 1958, and Assistant professor of Business Administration at Vanderbilt, as I told you previously.

For two and a half years I was a Market Analyst in the Market Research Department of Reynolds Metal Company.

I participated in seminars on religion and ethics in business at the Harvard Business School and in a forum on finance at New York University.

1148 Incidentally, the subjects I teach—I teach Marketing at Vanderbilt, both at the undergraduate and graduate levels.

I have done my research in the field of Business Administration and joint practices, and I have these publications as a result of that research:

"Personality Tests and the Selection of Salesmen," from Georgia Business in 1955.

"'Word-of-Mouth Advertising' in Selling New Products," in the Journal of Marketing in 1957.

I have a couple of short pieces in the Journal of Marketing. I won't bother to list them at this time.

One entitled "Does Low Market Occupancy Indicate the Absence of Monopoly Power?" which was in the Antitrust Bulletin in 1959.

One on "Volume Discounts as Barriers to Entry and Access," in the Journal of Political Economy in 1961.

One on "Injury to Competition Under the Robinson-Patman Act," in the University of Pennsylvania Law Review in 1961.

One on "Businessmen's Concepts of Injury to Competition," in the California Management Review in 1961.

A digest of that appeared in a publication called
1149 "The Executive" that is published by the Harvard Business School. A reprint of that is going to appear in the Antitrust Bulletin.

Then an article on "Price Cutting and Monopoly Power" in the Journal of Marketing in 1961.

And that article is going to be reprinted in a book, "Readings on Marketing," that is coming out the first of next year.

Then a piece entitled "Economic Bases for Findings of 'Injury' Under the Robinson-Patman Act," which appeared in a publication of the American Marketing Association entitled "The Social Responsibilities of Marketing."

That is the name of one of them. And that is a paper that I read at the last meeting of the American Marketing Association, at the last convention of the American Marketing convention.

And I am a member of the American Marketing Association, as you might guess, and also a member of the American Economic Association.

Mr. Tincher: Thank you, Dr. Brooks.

I think it might be helpful if this sheet is filed as an

exhibit here, this resume of the qualifications of this witness.

1150 (Thereupon said document was accordingly marked as Plaintiff's Exhibit 14, and same will be found among the exhibits in the cause.)

Q. Dr. Brooks, you have been in attendance at the trial of this case and have heard the testimony of all the witnesses, I believe, with the exception of the two expert witnesses——

A. Yes, sir, that is correct.

Q. (Continuing) ——called by the defendants.

Correction—I suppose there were more than two who were in the expert category.

At any rate, you have heard those other than the expert witnesses?

A. Yes.

Q. And you have heard the reading of excerpts from various depositions that have been taken?

A. Yes, sir.

Q. During the course of the testimony to which you have listened, you have heard considerable testimony to the effect that all sales of automotive tires to those who purchased tires for use rather than for resale are retail sales.

1151 Now, on the basis of your training and experience in the field of business administration and marketing, will you state whether or not in your opinion——

Mr. Burch: If Your Honor please——

Q. (Continuing) ——this classification is valid?

Mr. Burch: Just so the record will show that I was not asleep at this point, I want to object to any question directed to him other than based upon training and experience in the industry, about which no predicate has thus far been laid.

No jury is present, and no damage is going to be done

by hearing the testimony, and I expect Your Honor to overrule my objection, but at the same time I wish to make the objection so that Your Honor will know I know at least enough to do so.

The Court: All right. The objection is overruled.

Q. The Court has ruled that you may answer, Dr. Brooks. Do you need to have the question restated?

A. Well, yes. I don't guess it is in order for me to comment on this statement at this time.

Mr. Burch: I would certainly agree that it is not.

1152 A. Well, let's say it again.

Q. On the basis of the testimony which you have heard in the trial of this case to the effect that all sales of automotive tires to customers who purchased the tires for use rather than for resale, and on the basis of your training and experience in the field of business administration and the field of marketing, do you agree that the testimony so classifying those sales states a valid classification?

A. I do not agree with that.

Q. Do you agree with the testimony of those witnesses whom you have heard classify as wholesale sales only those sales which are made for purposes of resale?

A. I do not agree with that.

Q. Now, in order that we can understand the terms of reference upon which you base your opinions, would you define the term "retail" as it is understood in the field of marketing?

A. In the retail and wholesale trades, which are of course a very large part of the field of marketing, the term "retail" is applied to those transactions where the motive of the purchaser is buying is his own personal enjoyment or satisfaction.

1153 Q. Now, would you define the term "wholesale" as it is understood in the same field?

A. The term "wholesale" includes all those transactions where the motive of the purchaser is to use the product in the conduct of his business for profit-making purposes, or, if it is a non-profit institution, he intends to use it for the furthering of the aims of his institution.

Q. All right. What would be included under the term "wholesale", as you have defined it, as it is understood in the field of marketing, other than purchases for resale?

A. You would include purchases by manufacturers or commercial firms which are designed to produce another good or service, or to increase the value of some other good or service which will subsequently be sold to one who will not consume it, or who is an intermediary of finally, when it is in final form, will reach the ultimate consumer.

Q. There was considerable amount of testimony by the defendant, Mr. Steepleton, and by others who are part of the tire industry some way or other, that all sales to consumers are retail sales.

Will you state whether or not you agree with that?

1154 A. I disagree with that.

Q. In the field of marketing, is there in general usage some distinction between the term "consumer" and the term "ultimate consumer"?

A. Well, the authorities in the field of marketing have gotten together in the form of definition committee, and that committee published a series of definitions of the various terms in marketing. And the report of the committee was that actually the term "ultimate" is redundant in referring to a consumer because if a person is buying a product to use to produce some other product, or to produce a more valuable product, or a product that will command a higher price as the result of the purchase, he is not a consumer at all; he is a producer.

However, in general parlance, and to make exactly clear

what you mean by a consumer, oftentimes you will emphasize the fact that it is just the final consumer or the consumer of the product in its final form, or the service which is being purchased, to emphasize that it is limited —retail trade is limited to those cases where the buyer is buying a good or service in the final form, be-
1155 cause using the adjective "ultimate" you set it apart and make it perfectly clear.

Q. Is there an awareness among the authorities in the economics and marketing fields that the term "consumer" is used more loosely and with connotation other than that of ultimate consumer?

A. Certainly, the term in just a casual sense, conversational and without attempting to be strict about it, you might use the term "consumer" for a business firm that consumes one product in the manufacture of some other product or service, which he will then sell to someone else further down the line.

But as used—when someone is talking about "retail" and "wholesale", they are very careful about the usage of these terms.

And that is, I guess, the reason the term "ultimate" so generally appears. It is so that no one would make the mistake of confusing some intermediary producer with the man who consumes the product in the final form.

Q. Doctor, in the testimony that has been taken in this trial, you have heard the term "consumer" or "user" used.

Would you comment on those terms being used interchangeably and with reference to the basic defini-
1156 tion of "ultimate consumer"?

A. Well, every one who buys a product is going to use it in some fashion or another. The question is how are they going to use it.

If they use it for a profit-making purpose, somewhat

by necessity they have to use it to produce some other good or service, which they then sell at a profit after they have paid their expenses.

If they are going to use it for their own personal satisfaction or enjoyment, then it is another case.

Q. Well, in your use of the term "produce a good or service," would you give an example of the product or service which might be related to any testimony you have heard in this trial?

A. Well, one very good example in this particular case would be that of a trucking firm that is selling transportation service, or a bus line that is selling transportation service, and they use equipment, they use tires, they use bus tires to produce this transportation service which they are going to sell—probably in the case of the bus line to the ultimate consumer.

Q. Now, Dr. Brooks, I would like to ask you a few questions based on assumptions of fact.

1157 Assume a company operates a fleet of ten or more trucks in its business of transporting goods, and from time to time it buys from this defendant company, Steepleton General Tire Company, a portion of the tires that it needs for use in operating its trucks, how would you classify the sales of such tires by the defendant as to whether they are retail sales?

A. I would classify them as non-retail sales.

Q. Would your answer be different if the sales were made in lots of only one or two lots at a time to such customer?

A. No, my answer would be the same.

Q. Would your answer be the same if defendant's customer was a manufacturing concern operating the same number of trucks in its business?

A. It would be the same.

Q. Or if the customer was a laundry?

A. It would be the same.

Q. Or a sand and gravel company?

A. It would be the same.

Q. Or a general contractor or trucking contractor?

A. The same answer would apply.

Q. In fact, would your answer be the same for any
1158 business establishment which was buying those tires for that number of trucks for use in its business?

A. Yes, sir.

Q. With respect to the question of whether the sale of tires is a resale sale or not, would your answer be any different if the defendant's sales of such truck tires were made to a local government unit such as the county highway department, county school district, or county road district, or a municipality?

A. It would be the same answer, of course, on the basis that their motive was the furthering of the purposes of the institution.

Q. And assume that the tires so sold by the defendant are for use on earthmover or road grader equipment.

A. I would still classify it as non-retail.

Q. And assume, then, the situation that such sales are sales of passenger car tires for use by law enforcement officers or public officials of a county or a municipality.

A. They would also be non-retail.

Q. Now, I have some questions, Dr. Brooks, with reference to national account transactions that have been discussed in the testimony of Mr. Steepleton and Mrs. Lauderdale, which I assume you heard and recall.
1159 A. Yes, sir.

Q. Based upon that testimony, can you express an opinion as to whether such sales, namely, the delivery of tires to the so-called national account customers of General Tire & Rubber Company by Steepleton General

Tire Company, and subsequent transactions with reference to the invoices or records of delivery and crediting of Steepleton Tire Company's account by General Tire & Rubber Company, would you state whether or not those transactions constitute sales of merchandise by Steepleton General Tire Company?

Mr. Burch: If Your Honor please, the same objection. And I expect Your Honor to handle it the same way, and would not blame Your Honor if he did. But I call Your Honor's attention that here under the guise of putting on an expert witness they have asked the witness his opinion on a question of law, whether or not that would constitute a sale.

That is determined by the Uniform Sales Act. That says what is a sale. And cannot get—, and I think what
1160 he considers or anybody else—it is or is not a sale dependent upon that Act.

Go on with the question, if you want, and put it in the record.

The Court: The objection is overruled, if you are objecting.

A. Well, that is often called a drop shipment transaction where a firm buys a product from another firm and instructs that firm to deliver it to some other firm who is buying from this firm who makes the purchase.

Now, let me make this clear. You can, as a drop shipper, you can make a sale to a customer, buy your merchandise from a supplier, and instruct the supplier to make the shipment direct to the customer. In effect, there are two sales taking place simultaneously, the sale from the supplier to the firm that is requesting the drop shipment, and the sale by the firm requesting the drop shipment to its customer. But the delivery is made direct.

Q. In view of your answer, Dr. Brooks, would that transaction properly be a part of the gross annual dollar

volume of sales with reference to Steepleton General Tire Company?

A. Yes, certainly. This is Steepleton's merchandise.
1161 He owns it. He is delivering it to a customer of the General Tire Company in accordance with some previous agreement whereby upon this customer's request of delivery the sale of the tire is made by Steepleton to General, but delivered to General's customer.

I might add that of course General is then obligated to pay Steepleton, and General's customer is obligated to pay General, of course.

Q. Are you acquainted professionally and personally with Dr. Leigh, who testified earlier today?

A. Yes, I am happy to say that on a couple of occasions he has asked about whether I would be interested in working for him up at the Akron University.

* * * * * * *

1165 Q. Dr. Brooks, I have here Plaintiff's Cumulative Exhibit 13. And I turn to the third sheet of this
1166 cumulative exhibit, and ask you to read aloud that portion which is in quotations which—well, that portion in quotations.

A. (Reading) "The character of tire dealers has altered as they adapted themselves to the new competition and to changing market demands. These dealers have become primarily semi-wholesalers, truck tire sellers, and recappers instead of passenger tire retailers. The dispersion of the tire market plus the fact that a little retailer or gasoline station needs to carry only five passenger tire sizes to top 87 percent of the passenger car market has encouraged the multiplication of tire outlets. Tire manufacturers have encouraged tire dealers by their discount programs, to carry tire stocks and sell and supply these small sub-dealers. On the other hand, the drift of pas-

senger tire purchasing from downtown stores to outlying convenient locations has caused the large, more centrally located dealers to concentrate on the large-volume commercial account business, recapping and other tire services."

Q. Do you have educational training or experience outside of the academic field which enables you to comment on that quotation of Dr. Leigh?

1167 A. I would like to first say a couple of things here—may not be too important. In other words, the word reads there "t-a-p". Obviously, it is misspelled as "t-o-p" in this exhibit. Don't know if that is important. The other one is that I recall the footnote from this book which was appended to this quotation.

* * * * * * *

1174 Q. Dr. Brooks, quoting from Plaintiff's Cumulative
1175 Exhibit Number 13, the part that appears in quotation marks on this page, Dr. Leigh states, "The character of tire dealers has altered——"

Mr. Ray: He read it out loud.

Q. This was read by you?

A. Yes.

Q. Do you agree with the quotation from Dr. Leigh's portion of the book?

A. Yes, I agree. I might say you also were asking me a question of whether I had experience in regard to this particular trade.

Mr. Tincher: Yes.

A. (Continuing) Well, this is my business. I am a professor of business administration. And it is my business to keep up with developments in the distributive trades and to do research on business practices in these trades just the same way Dr. Leigh does. He is not academically—our job is to look at what is going on and to

find out what is going on, and to give it to our students, and to share it with other people who are teaching business administration.

Q. And as to the research, does that include the tire distribution system?

A. Certainly, because this is one of the most im-
1176 portant segments of the area. It is a very important part of my subject matter. I have students who keep me up to date on some of these things.

Mr. Tincher: May I have Exhibit Number 6, the bulletin?

Q. Dr. Brooks, I have passed up to you bulletin which has been marked and entered as Exhibit Number 6 for the plaintiff in this case, and I ask you to look at page 33, about half way down the page, in the first column, Section 779.37, "Application of the 13 (a) (2) and 13 (a) (4) Exemptions to the Automotive Tire Trade," skipping to subparagraph (b):

> "In applying the tests of the exemption under section 13 (a) (2), all sales of tires, tubes, accessories and tire repair services, including retreading and recapping, are recognized as retail in the industry, except those set out in subparagraphs (1) to (6) of this paragraph."

Now, I will read subsection numbered (1)——

Mr. Ray: He has already read it.

Q. (Continuing) You have read subsections (1) through (6) of this bulletin, have you not?

A. Yes, sir.

1177 Q. Do you agree with the classifications as set out there in the bulletin with reference to their being other than retail sales in the tire industry?

A. Yes, I do agree. I think they are a little limited in some of those, but I imagine that is for administrative purposes. But, if anything, I would say that—well, strictly speaking, sales to commercial or business buyers who have

less than ten trucks would also be non-retail. But I can see for administrative purposes why you might want to draw the line at that point.

Q. Do you mean by that that if the representatives of the Wage and Hour Administrator's office had considered material and arguments and various and sundry statistics presented by the industry, that the Administrator may have taken those into account and given a determination which was more limited and more professional to the industry than the strictly academic viewpoint would be?

A. Yes, sir.

Mr. Tincher: You may have the witness.

1178 **Cross-Examination,**

By Mr. Burch:

Q. Now, Doctor, among the other research that you have done—and I am not asking you whether you agree with it—what your opinion is about it—but I am asking you if you are familiar with Section 213 (g) of 29 United States Code Annotated, which defines a retail or service establishment there in the Act.

Have you read it?

A. I haven't read it in the United States Code.

Q. Well, let me read it to you:

> "A 'retail or service establishment' shall mean an establishment seventy-five percentum of whose annual dollar volume of sales of goods or services (or both), is not for resale and is recognized as retail sales or services in the particular industry;"

Have you read that?

A. Yes, sir, I have read it elsewhere.

Q. Now, the fact that Congress put that in the Act clearly indicates that particular industries have particular classifications, is that not so?

A. Yes, sir.

1179 Q. Now, are you prepared to tell us what industries do or what industries do not have that particular classification that you in your mind have given as governing the tire industry?

A. This is classification that is based on practices in industry.

Now, the tire industry of course has ways of classifying its customers for various purposes. And as far as identifying the types of customers that we have, I am aware that the tire industry has a traditional three-fold classification of its customers, namely——

Q. Well, have you particularly researched the various industries so that you can tell us now what industries this definitely fits and what industries it does not fit?

A. This is a—there is nothing that I have ever come across which is in conflict with this definition, which of course comes out of research of industrial practices.

Q. So, as far as you are concerned, this business of "retail sales or services in the particular industry" is meaningless because, according to your research, the classification is the same in all of them?

1180 That is your testimony, isn't it?

A. Well, I wouldn't say it is meaningless. But I think the results would turn out to be the same.

Q. So you would give the same definition of wholesale or retail whether you were in the ice business, whether you were in the fuel business, whether you were in the whiskey business, whether you were in the petroleum products business, whether you were in the tire business, whether you were in the engine business—whatever it was, it would be the same?

A. Well, my opinion is that it definitely would be consistent with the one I have given.

Q. Are all of those industrial?

A. Yes, sir.

Q. Now, as bearing upon this research that you have done in the tire industry, in this brochure here I see about your teaching experience, and when you say "Other professional experience," you say you have been a market analyst in the General Sales Office of Reynolds Metals Company.

This is an aluminum company?

A. Yes, sir.

1181 Q. And been a participant in the Danforth seminar on religion and ethics in business at the Harvard School of business in 1959. That is so?

A. Correct.

Q. And you have been a participant in a forum on finance at New York University in June, 1960.

That is the other professional experience there listed on the sheet, wasn't it?

A. Yes, sir.

Q. Now, you haven't listed any in the tire business. And I want to check some things with you as bearing upon your knowledge about it.

Have you ever been employed by anybody in the tire industry?

A. No, sir.

Q. Have you ever worked in a recapping plant or in a tire manufacturing plant?

A. No.

Q. Have you ever worked in a retail or wholsale establishment?

A. Yes, sir.

Q. Of the tire industry?

A. Not in the tire industry.

1182 Q. Every question I ask you has to do with the tire industry unless I specify otherwise.

Have you ever been in your academic and professorial

capacity, or any other capacity, attended any seminars in the tire industry?

A. I haven't attended any small seminars. However, there were these tire industry meetings down at the University of Georgia, and I talked with the professors who were there on that.

Q. Talked with some of the professors?

A. Yes, sir.

Q. ——That had been to them?

A. Yes, sir.

Q. Had been to the conference?

A. That is right.

Q. And have you been employed as consultant to anybody in the tire industry?

A. No, sir.

Q. Do you subscribe to any publications of the tire industry?

A. No.

Q. Have you ever testified before any Congressional Committees on the tire industry?

A. No, sir.

1183 Q. Have you ever read the testimony of representatives of the tire industry before Congressional Committees?

A. Yes, sir.

Q. Well, can you point out in all of your research, just as you have stated there, whether or not you agree or disagree with the testimony of Dr. Leigh,—point out the testimony of representatives of the tire industry before the Congressional Committees with whom you agree or disagree?

A. Well, in reading this testimony, I saw nothing in conflict with my opinion about it, and I did not make any notations of who those people would be.

*Testimony of Dr. Robert C. Brooks, Jr.*

Q. Did you find any testimony before the Congressional Committee—or any Congressional Committee—by anybody in the tire industry who recognized the definition of retail and wholesale in that business that was not that it is retail if it is for consumption or use, and wholesale if it is for resale? Every line of evidence before every Congressional Committee you read was to that intent and purpose, was it not?

A. The classification—there is another classification.

Q. Would you please answer the question, and we can get along better?

A. All right.

1184 Q. If you will answer it, if you can, yes or no, then explain.

A. Well, will you state the question again, then?

Q. The question is: In all this reading you did of testimony before Congressional Committees which you have just stated you did, did you find a line of evidence by anybody from the tire industry that did not bear out the provision that in that industry that if a sale is to be an ultimate consumer or user it is retail, if it is for resale it is wholesale?

A. I will have to answer that in this fashion, that I can't refer—and I am sorry that I can't give a more direct answer—I would have to refer to the testimony to cite evidence from that testimony.

But I have seen "retail" appear in another classification separate from that of "wholesale" or that of "retail".

Q. In a Congressional Committee, by anybody in the tire industry. That is my question to you. That is what I am talking about.

A. I am sorry that I am not able to tell you that because I can't point to it.

Q. Now, on your other qualifications, you have been
1185 very familiar with practices in the tire industry, about selling practices, and you know what they are about when I use the language of the tire industry, do you?

A. Not completely. At this particular point I think so.

Q. Well, now, you know when you are located in a town they have a particular jargon, just as if I were to say to Mr. Clark, "The rule in the Shefley case is no longer the law in Tennessee," he would know what I am talking about but you would not, would you?

A. Yes, sir.

Q. And if he said it is a matter regarding an expert in economics, it would mean something to you gentlemen but would not mean it to us, would it, sir?

A. That is correct.

Q. Now, you know that every industry in its publications and in its trade meetings and in its communications between its members has a similar idiom, they all have their unique expressions to characterize the industry, don't they?

A. Yes, sir.

Q. So, in order to follow what people in the tire
1186 industry were talking about when you made these researches into their practices, you of course acquainted yourself with their idiom, didn't you?

A. Well, insofar as they use jargon. But there are some places where they would not use jargon.

Q. Well, you came across the phrase, the "MTO".

What is the "MTO"? You consider that you did not run into anything about the "MTO"? What is "MTO"?

A. I would simply have to guess about the words there.

Q. Well, when you read about these hearings—about parts of hearing—the "MTO", what were they talking about?

A. Well, if I saw that in context I could—I would either determine what it meant from the context or else I would make inquiry, if it seemed to be an important point.

Q. You have never seen that phrase before?

A. I don't recall seeing that phrase, sir.

Q. If I told you that you could get MTO cheaper at Steepleton than you could at General, what would it mean?

A. I wouldn't know.

Q. Well, if I told you that the MTO, Doctor, is manufacturer's take-off that somebody would take off a
1187 new car and go into Steepleton's store, would that mean anything to you?

A. No, sir.

Q. What is an "OB" take-off?

A. I don't know.

Q. Never run into that either?

A. Not that I recall. You must, of course, relate that whenever you read it at the time to the context, knowing full well what it meant—and just have forgotten.

Q. What is Bucron?

A. Well, I gather this is a form of rubber.

Q. What form of rubber?

A. Some kind of—this would be conjectural—I don't know.

Q. You don't really know, do you?

A. No, sir.

Q. Actually, you don't know anything about the tire industry as an expert in the industry, do you?

A. I disagree with your statement.

Q. Well, let's just analyze what you are talking about. You have not been to any meetings, you haven't worked for them, haven't read any of the technical
1188 publications, you haven't been before committees——

A. I don't feel that that is required by the type

of work I do. I limit myself to those things that are of fairly general interest, and otherwise, in teaching students in the university——

Mr. Burch: Oh.

A. (Continuing) I don't go into the technical issues of that sort. It would be a waste of time.

Q. You know Dr. Beck, who has been widely quoted as upholding your view?

A. I think it is Beckman.

Q. It is Beckman, yes.

A. He would be very hurt if he heard his name pronounced that way.

Q. And you see, I don't know any more about the literature on this business than some people do about the tire business.

Mr. Ray: While he is looking that up, Your Honor, I might comment that I believe Mr. Burch in some way may not be too sure there isn't twelve men sitting up there instead of one man or judge. And his approach here would indicate that.

Mr. Burch: I don't know what Mr. Ray is about, if it is an objection.

1189 Mr. Ray: Yes, you do.

Q. Now, you say you don't think it is necessary to know about those things?

A. Yes, sir.

Q. Now, Mr. Ray——

A. (Continuing) Not for purposes of my job.

Q. Mr. Ray there just said something—it is some import for the record.

He went over certain cases with you in which what you have just said in substance has been clarified by the courts, didn't he?

A. No, sir.

Q. Did he read you this excerpt:

"We believe that the company here amply sustained the burden of proving that its business and its sales are recognized as retail in the fertilizer industry. Industry members were unanimous in their opinions on the question, and offered a reasonable basis for their distinctions, which cannot be arbitrarily rejected because they were interested witnesses. The Secretary's evidence was for
the most part based on the classification of the fer-
1190 tilizer industry for census and other purposes,
made by general standards adopted for use in classifying all business. Thus Professor Beckman, while an expert in matters relative to the census of wholesaling, did not profess any personal knowledge of the fertilizer industry. He had never been in a fertilizer plant. He did not believe such knowledge to be relevant to the issues, stating, 'I don't think it's pertinent and I wouldn't even go across the street to accomplish that purpose'."

A. Umhum.

Q. Now——

A. I don't——

Q. What the Court said about that—you mean he did not go over that with you at all?

But didn't he or Mr. Tincher one here—in talking about the testimony of Dr. Buzzell—that is correct?

A. No, that is the first time I have heard that.

Q. That is the first time you have heard that?

A. But that is the basis of Mr. Beckman stating—the basis of the evidence.

I cannot use there someone else's facts or clarifica-
1191 tions as the basis for my own testimony.

Mr. Ray: If Your Honor please, I would like to object to Mr. Burch—he makes a big point on this. I object to just taking him to task on his testimony, already testified to these facts, so he is going to take the cases here and make a big thing on these explanations.

Mr. Burch: I have got my opinion about the witness, but not that he is lying.

Q. Now, is there anybody to your knowledge there that has any different opinion than you on this subject, the clarification of retail and wholesale?

A. No, sir.

Q. You just state the only view you know of that is accepted and in current acceptance anywhere?

A. Well, there it is, that the term "wholesaling" is used to designate all sales other than retail sales. Now, some people—and in fact by necessity you have to talk about sub-categories on wholesale trade, such as industrial sales. But they are all considered under the head of wholesale. When we talk about wholesaling, we are not merely including the sales for resale, but such

1192 character of other sales such as I have indicated.

Q. When you say "we", who is "we"?

A. The people who are in the business of looking at the wholesale and retail trade and trained to give an objective discussion of practices in the trade.

Q. Let's use another "we". Let's don't use "we" as people in the business of looking at the industry. Let's use "we" as we who are in the business.

Do you know any of us that are in the tire business that agree with you?

A. Well, I think that in talking about classification——

Q. If you can give me a yes or no, and then give me anything you want, we will move along much faster.

A. Well——

Q. Do you know any responsible individual in the tire business who agrees with your classification of wholesale and retail?

A. I will say yes, in that the testimony—well, for one thing, the testimony of people who have given depositions on your side and on this stand or in this proceeding to my

mind have—when you refer to their terms of classification of types of customers, rather than at what their
1193 terms are, and the ones we have to buy tires here on some other basis, that they do recognize it.

Q. Well, we have got the record as to what people testified to here.

A. Yes.

Q. And my own view is that they all have testified just the opposite from you. But that is a matter the Court will finally decide.

Other than the people who have testified here, do you know anybody in the tire industry who agrees with you that a commercial sale is not a retail sale?

Can you give the name, address, telephone number, if you would know?

A. Can't do.

Q. You don't know anybody does, do you?

A. Well, no, sir, I know somebody—know one in that category.

Q. Well, now, there are, of course, thousands and thousands of people in the tire business. And in your research, out of the dozens of people you have met and the people you consider as expert witnesses in this case, you must have interviewed more people than one to see if they agree with your pedagoguery—the views that
1194 you have, haven't you?

A. I did not feel that was necessary, Mr. Burch, because from the depositions I had the very clear impression that they did recognize it the way I do except for purposes of—for some other purpose. In other words, in context of classifying types of customers, it seemed to me it was common to recognize this three-fold classification.

Q. Can you tell me the name of a single person whose deposition you have read who has not said that a com-

mercial sale in the tire industry is classified as a retail sale?

Take the depositions anywhere. If you can find that, take them out and do it.

A. Well, this is evident there that the question gives a situation where they have to place their three-fold classification that they are accustomed to into a mold—

Q. Dr. Brooks——

A. (Continuing) ——which involves only two classifications.

Q. Dr. Brooks, I am very respectful of men of learning, and you have got a full panoply, and you are a nice man. But I have also a respect for directness.

Can you tell me—give me the name of any person
1195 in the tire industry who you can cite at this time who will say that a commercial sale is not a retail sale?

That is my question. Now, answer it.

A. Not on this.

Q. Very well, sir. Do you know of any widespread body or belief that is generally accepted that holds the view that all sales to the ultimate consumer, no matter what the quantity, are retail, and all sales to people for resale are wholesale?

A. Certainly, this is correct. But we must be careful of the term "ultimate consumer".

Q. Every ultimate consumer. Do you know any respectable authority that holds that every sale that is not for resale is retail?

I will put it that way.

A. No, sir.

Q. You don't know any?

A. No, sir.

Q. I am reading Chapter 1 of the Tennessee Retailers Sales Act which regulates every transaction in this state:

"'Retail Sales' or a 'sale at retail' means a sale to a consumer or to any person for any purpose
1196 other than for resale in the form of tangible personal property."

A. Well, that is giving two categories of consumer. Well, then, any person buying other than for resale—that does not equate my opinion. I have read that particular passage, and that is retail for purposes of that Act.

Q. Well, I am talking to you about retail for purposes of the tire industry, too.

A. Well, I will grant that this is the definition of "retail" for purposes of that Act.

Q. Well, so, if Mr. Steepleton sells a thousand tires to Gordons Truck Line, Mr. Steepleton classifies it as a retail transaction, and the Commissioner of Revenue of the State of Tennessee—they classify it as a retail transaction, do they not?

A. I would say that the Commissioner—no.

Q. You would say yes or not?

A. No, sir. And I will have to explain.

Q. Do.

A. The Revenue Commissioner classifies it as a sale that is subject to the tax.

Q. Have you got any idea of what the Commissioner thinks about it other than what—the way the law
1197 phrases it—plain enough?

I am repeating it:

"'Retail Sales' or a 'sale at retail' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property."

Do you know of any thinking of the Commissioner other than what the law says it is?

A. The law is designed to collect revenue, and they have included among the sales on which tax must be paid

retail sales; they have also included all sales other than for resale.

Q. Now, the definition——

A. I don't think it is necessarily.

Q. The definition that I gave you, you know, now that it has been called to your attention, is in effect and I have correctly read it, I believe, Doctor?

A. Well, you had a lot of quotes there.

Q. Well——

A. (Continuing) But maybe it is, but I don't—I am sure you read it correctly.

Q. The quotation or the statute?

A. These are the terms for the—this is not called the Retail Sales law.

1198 Q. It is——?

A. It is called the Sales and Use Tax law.

Q. Now——

A. (Continuing) I see. Retailers' Sales Tax Act, yes, sir.

Q. Now, you said before you read that—you stated positively it was not called that?

A. This is my impression from earlier reading. And I will still subscribe to that because even on second—the title of it, Retailers' Sales Act—see, it doesn't say—Retailers Sales Tax Act, as written.

Q. Now, that is the difference you wish to call attention to.

If Mr. Steepleton sells a thousand tires to Gordons Truck Lines, according to his testimony, and all these other people who have testified all classify it as retail sales, you say that is wrong?

A. No, sir, he may classify it—he may use that term to indicate those sales on which he must pay sales tax. I don't think that is wrong necessarily.

Q. Is that the proper classification that he makes there in that case?

A. If for the purpose of accumulating the sales on which tax must be paid, it is appropriate.

1199 Q. So, when the industry makes the classification, you believe you or somebody else can come down out of the dormitory or college and find out what their purpose was and then have them conduct their business in line according to the purpose, is that it?

A. No, sir. I am simply saying that I don't see anything wrong with him accumulating those sales for that purpose.

The Court: Suppose we have a little break in the proceedings, gentlemen, about ten minutes.

(Recess.)

Mr. Burch: May I proceed, Your Honor?

The Court: Yes, sir.

Q. Dr. Brooks, in your researches of your studies of the tire industry, are you aware of any meetings that were held by representatives of the tire industry generally in which they met and freely and voluntarily entered into their own definitions of retail and wholesale for their industry?

A. Yes, sir.

Q. What are some of those?

A. Well, the NRA codes would be the ones that come to my mind.

1200 Q. Well, now, let's start with that, now, just a minute. You don't hardly remember the NRA code, do you?

A. No, sir. I remember that Blue Eagle, though.

Q. The NRA code resulted from a statute which suspended the Sherman and Patman Acts and made it possible for the industries to band together for the purposes of fixing their prices, didn't they?

A. Yes, sir.

Q. Later declared unconstitutional?

A. Right.

Q. But before it was declared unconstitutional, each industry did form its own industry code with the Government's sanction, and the people themselves decided how to run their industry, didn't they?

A. Yes, sir.

Q. Now, the NRA code that was adopted by the tire industry was not in accordance with your definition, was it?

A. Well, I saw that and——

Q. When did you see it, by the way?

A. I saw it—oh, about three or four days ago. I had seen it earlier, though. I saw it earlier than that. But I did see it three or four days ago, it is true.

1201 Q. Do you know that back in the dark days of 1934 that the tire industry did adopt exactly the same definition of "wholesale" and "retail" that Mr. Steepleton had adopted, and exactly the same that the Sales Tax Act has adopted, don't you?

A. I looked at those codes and I did not——

Q. I asked the question——

A. No, sir.

Q. Do you know that they did that, or do you not know that they did that?

A. They did not adopt the same definition.

Q. Well, I will read the term "Retail," and I am reading from Article 1 (a), Code number 410, approved May 1, 1934, entitled "Code of Fair Competition in the Retail Rubber Tire and Battery Trade."

Section 1:

"The term 'Retail Rubber Tire and Battery Trade' or 'Trade' as used herein, shall mean the sale or offering for sale to the ultimate consumer and not for resale purposes."

Did I correctly quote it, as far as your memory goes?

A. Yes, sir.

1202 Q. Now, then, again——

A. (Continuing) But I would like to explain why I don't feel that that is——

Mr. Burch: Very well, sir.

A. Can I explain?

It seems to me that this is a definition of a retailer, and it leaves out those firms who sell for resale because of the qualifying phrase "and not for resale." That leaves out the firm that sells for resale.

This is not a percentage thing. There is nothing about percentages or even predominance in there.

Q. You mean to say that under your consideration of the NRA code that if you sold one dollar of wholesale that you were not a retailer?

A. Well, of course any——

Q. Do you or not?

A. There might—some inconsequential——

Q. It meant preponderately, didn't it? It is not like being a little bit dead or a little bit pregnant or a little bit something else. According to your testimony, if you did any of it, you weren't the other, is that what you mean?

1203 A. Not by the definition—what you are telling me.

Q. So that under the retailers' code of NRA, that anybody who sold anything for resale was not a retailer—is that what you are telling me?

A. Under rigid interpretation of the code,—did you find any interpretation or any ruling?

Q. Or anything else to that effect? You can't give us, then, anything to sustain that conclusion?

A. It seems to me that this is the code for firms who do sell tires, batteries and accessories, or firms that Mr. Steepleton would sell to. This would not include the firms

like Mr. Steepleton, who is in the tire business and who sells to these firms you are talking about.

Q. Well, now, Dr. Brooks, you haven't got any interest in the outcome of this case; you want to see the correct result reached, don't you?

A. Yes, sir.

Q. And I will ask you if you don't know that the industry adopted this definition:

"The term 'retail rubber tire and battery trade' or 'trade,' as used herein, shall mean the sale or
1204 offering for sale to the ultimate consumer and not for resale purposes."

No matter what you think about it, that is what it says, doesn't it?

A. Yes, sir.

Q. So, according to this code, everything that was sold to the ultimate consumer was retail, wasn't it?

A. Not in accordance with this code, as I understand it. To my mind this code applies only to firms who do not resell.

Q. Now, is all your testimony based upon the same firmness of opinion that you hold on this one that you have just expressed?

A. Well, yes, sir, I believe it is.

Mr. Burch: Very well, sir.

A. (Continuing) It is my opinion.

Q. So you say that——

A. (Continuing) There are other reasons than simply what I have indicated.

Q. Let's pass, then, to something else.

Now, the next time that the industry got together on defining what was retail and wholesale was—another emergency situation—was when the incipiency of war made it necessary to regulate prices.

1205 What did they do, do you recall?

A. At this time I don't.

Q. Well, would you think it was fairly important, then, that you know what the industry, when it convened and decided on terms to govern itself—wouldn't you think it important to know what its definition was?

A. Well, frankly, I thought the NRA codes were a very good source of that sort of information, and I did not—I have not paid too much attention to the OPA code because it was a wartime situation and the purposes of the code was one of rationing, and things like that.

Q. You have learned all that within the last three days, because you did not know about the NRA Code until then?

A. Yes, sir, I have known about NRA ever since I started in the business.

Q. You haven't read it?

A. I have read NRA codes. I don't know whether I read the tire industry, actually.

Q. The OPA Act, of course, was sustained in every case that was tried, that covered numerous courts for several years. It was the result of a collection of thinking in the industry, in which the industry got up its own

1206 definition.

And do you know what that definition was?

A. No, sir.

Q. I am going to read it to you.

And this, counsel, is published in 7 Federal Register, page 35, on December 30, 1941, nineteen days after Pearl Harbor.

> "When used in this Schedule, the term 'Sale at Retail' means any sale to a purchaser for use by such purchaser and not for resale."

And that refers particularly to the rubber industry relating to retail prices for rubber tires and tubes. That is price schedule 63.

Now, let's carry your contention that you are contending for to its conclusion. And, for example, whether or not it is reasonable.

I ask you whether or not you think it is reasonable.

According to your definition, any sale to a person who does not use the product for his own personal enjoyment should be wholesale, should it not?

A. Yes, sir.

Q. Any sale that is used to further commerce and where the purchase is made by, say, a truck driver, not
1207 for his own use, is wholesale?

A. Yes, sir, for a business purpose.

Q. So, if a taxi driver or the owner of one gravel truck drives up to any Humble gasoline station in this city and buys nine and a half gallons of gasoline out of the pump, that is a wholesale sale?

A. Yes, sir. But it would be hard to collect sales tax on the meter, I would imagine.

Q. Doctor, in all your wisdom have you not learned that there is no sales tax on gasoline?

(No answer.)

Mr. Burch: That is all. I don't want to ask him any more.

**Redirect Examination,**

By Mr. Tincher:

Q. Dr. Brooks, in addition to your acquaintance with the tire marketing industry, as distinguished from the tire manufacturing industry about which Mr. Burch was asking you, I take it that you have had the usual experience buying tires for your own use and for your own automobile, have you not?

A. Yes, sir.

1208 Q. Mr. Burch inquired something about your experience in wholesaling, and when you gave an affirmative answer he did not pursue that point.

Would you explain briefly what your knowledge from experience in the wholesale business has been, sir?

A. Well, my father was a wholesale grocer, and I worked for him from time to time, and I have bought accessories and automobile parts for his vehicles which were used in his business.

Q. Could you say whether those parts and accessories were purchased at wholesale?

A. They were purchased at wholesale. I got what is called the commercial discount.

Mr. Tincher: That is all.

**Recross-Examination,**

By Mr. Burch:

Q. You say your father was a wholesale grocer. He was in the business of purchasing groceries for resale, wasn't he?

A. Yes, sir.

Q. Now, as part of what you say is a wholesale transaction, does that imply that you get a price cheaper
1209 than the prices paid when you get a retail transaction?

A. In general, yes, sir.

Q. So if a man is buying at a higher price in one category than is paid in another category, the higher price goes with the retail concept and not with the wholesale concept?

A. Yes, sir, that is a broad generalization, but there are exceptions to it.

Q. Now, does the concept of continuing service go with the wholesale concept or retail concept?

A. I think that is something you find in both wholesale and retail transactions.

Q. Well, let's generalize, if you can. Don't you usually find that the ultimate consumer expects more service than the person who buys for resale and does not use the item?

A. No, because the consumer seems to be going into the do-it-yourself type of thing where he actually takes over some of the services that were formerly done by the businessman, while many of your large commercial customers are shifting some of their functions they probably performed to their suppliers, and these are services they get along with the product.

Q. So, as you testify—so we will know what you
1210 are telling me, you consider there is a greater degree—you consider the concept that you expect more service to go with a wholesale transaction, generally speaking, than with a retail transaction? Is that what you are telling me, Doctor?

A. No, sir. I am saying that both of them involve services in varying degrees, and that there is possibly a trend toward more service at the wholesale level and less at the retail level, which was possibly gratuitous, I don't know.

Q. Now, if he purchases a wholesale television, he gets no service with the television, does he? The television does not have to perform for him, it just sits there grating on his nerves, he does not expect any service, though another ultimate user getting this thing gets service and is entitled, of course, to have some service?

A. Well, no, most customers are entitled to it, in any event—the ultimate consumer.

Q. My point, as I say, you expect service to the ultimate consumer and not to the man who holds it for resale? Is that so or not?

A. No, sir, they have to—I don't think that is taken into account on services which are provided for a
1211 middleman by his supplier. For example, a one-day delivery service is getting to be very common in some trades. Now, this is not servicing the product, but it is performed—or a service with the product.

Q. I am talking about servicing the product. I trust that I make myself clear about this, Doctor. Don't you know that a continuing service on the product is something that goes with retail as opposed to wholesale conception?

A. It goes with both because—well, take, for example, a piece of heavy machinery that is used in a manufacturing plant—now, the maker of that machinery is usually obligated to make repairs, go down to that plant any time that machine fails, they are supposed to have repair parts available to cover that.

Q. The maker of it?

A. Yes.

Q. You mean to tell me the Ford Motor Company will give you a nickel's worth of service on your automobile?

A. No, I am talking about capital machinery in a plant.

Q. Well, Doctor, we are not talking about any capital machinery anywhere in this lawsuit. We are talking about articles that are customarily consumed, consumer goods.

1212 Now, please stick to consumer goods—the line of business. So please stick to consumer goods in the line of business.

Is it or not true that continuing service of the product is more usually referable to retail than to wholesale transactions?

Now, please give me your answer, and I hope we are——

You know that, you don't have to think, Doctor.

A. It depends on the way we use "consumer", the sense—in any situation—now, which way do you want me to use it?

Q. Who furnishes the servicing for tires, the manufacturer or the seller?

A. The immediate seller.

Q. The immediate seller?

A. Yes, sir.

Q. Who furnishes the servicing on a radio?

A. Well, now, that is a case where sometimes the manufacturer does it through some service center that he will establish.

Q. Well, now, can you imagine of any circumstance where the distributor—the wholesaler—the man who holds the warehousing stock and has no connection whatever with the ultimate purchaser, is called upon as a customary thing to give service on the product?

1213

A. To that man—to the wholesaler?

Q. To anybody on the product. There is no privity of contract between the purchaser and the distributor; the privity of contract is between the purchaser and the person who sold it to him, isn't it?

A. Well, I don't know what you mean by the term "privity of contract".

Q. Well, I am sorry. That is some of this jibberish we lawyers use.

But you told me what a sale was. I thought you knew what privity of contract was.

A. I told you that in a marketing sense, not legal.

Q. Let's talk about this just a minute. This drop shipment business you mentioned, you don't mean to tell me that the person who furnishes the goods to the customer in a drop shipment relation sustains the relation to the seller, do you?

A. Yes, sir, I do say that.

Q. You mean to say that if I go down to the Vaiden depot, which is perhaps the preeminent drop shipment warehouse here in Memphis, and I present an order on the warehouse stock for one Norge washing machine, and I pick that thing up and take it with me, and take it down to Hushpuckena, Mississippi, and

1214

take it down and sell it, that the Vaiden Warehouse Company has sold me that?

A. Well, if they have it on consignment.

Q. Well, this is a warehouse—a public warehouse. They are holding this. It belongs to some other firm and they are holding it for this firm on some arrangement previously agreed on. They deliver the goods to you. That would not be, of course, a sale, sir, would it?

A. Considering how the drop shipment is usually used, the ones I knew, it has been.

Q. According to you—according to what the law is—assume by the question a hard-hearted situation, any situation other than yourself.

A. Yes, sir.

Q. Let's take this question, then. If a national account customer comes to Steepleton and presents an order for two tires, who has sold the man the tires?

A. The General Tire Company.

Q. Not Steepleton Tire Company?

A. That is right.

1215 Q. And Steepleton does not have to collect the sales tax, does he?

A. No, sir.

* * * * * * *

1217 **DR. JOHN R. MOORE,**

having been first duly sworn, testified as follows:

**Direct Exam[illegible],**

By Mr. Tincher:

Q. Will you state your name, please, sir, and your place of residence?

A. John R. Moore, 5208 Pinnacle Lane, Knoxville, Tennessee.

Q. The University of Tennessee is located at Knoxville. Are you on the staff at the University?

A. Yes, sir.

Q. In what position or what department, please?

A. I am a professor of economics.

Q. And what——

A. (Continuing) In the Department of Economics, professor of Economics.

Q. What subjects do you teach, Dr. Moore?

A. I am principally involved in teaching managerial economics, which is directed, of course, to undergraduate students, and a course in economics on the graduate level.

Q. How long have you been on the staff of the University of Tennessee?

A. For nine years.

1218 Q. What academic degrees do you hold, please?

A. I have a Bachelor's degree from Colgate University; Master's Degree and Doctorate from Cornell University.

Q. I understand you have also done graduate work at Harvard University Graduate School of Business, is that correct?

A. Yes, sir. I spent a year in '59——

Mr. Burch: If Your Honor please, Mr. Tincher has passed me a biographical sketch of this gentleman, and to save a lot of reading, we will just put it in the record.

Mr. Tincher: Thank you.

Mr. Burch: ——If he tells us the biographical sketch is correct.

Q. This biographical sketch consisting of two sheets, Dr. Moore, does that set forth in summary form your educational training and your experience?

A. Yes, sir, it does.

Mr. Tincher: I wish to offer this in evidence as Plaintiff's Exhibit number 15.

(Thereupon said document was accordingly marked as

Plaintiff's Exhibit 15, and same will be found among the exhibits in the cause.)

1219 Q. To elaborate just a bit further on your qualifications, Dr. Moore, have you appeared or participated in any hearings before a committee of the United States Senate?

A. Yes, sir, I have.

Q. What did those hearings relate to that you appeared?

A. I was called as one of the five expert witnesses by Senator Kefauver's Subcommittee on Monopoly—Antitrust Monopoly—to testify in the opening session of his investigation on administered prices.

Q. Well, now, if I understood you correctly, you in recent years have concentrated your studies and research and teaching in the field of business managerial economics; is that correct?

A. That is right, sir. We refer to our work in this area as managerial economics. And at the present time I am preparing a textbook in the area of managerial economics.

Q. And, if I recall correctly, you have set forth on your biographical data the name of a book on economics which you have authored and which was recently published; is that correct?

A. That is right. The book was published just this May, a text book on economics.

1220 Q. Yes. And you collaborated with——?

A. That is correct, with some other members of our staff.

Q. Now, are you familiar—, on the basis of your knowledge and research in the economic field and in other areas you have mentioned, are you familiar with accepted definitions of the term "retail" as used by leading authorities in the fields of economics and marketing?

A. Yes, sir, I believe that I am.

Q. You have listened to a considerable amount of testimony by witnesses in the trial of this case to the effect that all sales of automotive tires to those who purchased the tires for use rather than for resale are retail sales, have you not?

A. Yes, sir, I have.

Q. On the basis of your knowledge and experience in the field of business and economics, will you state whether or not such a classification is a valid one?

A. As I understand the testimony presented here, the definitions employed by the witnesses would not accord with my definition, certainly of retail and wholesale classifications.

Q. With reference to the usage of certain witnesses
1221 in this case that automotive—that in the automotive tire industry the only sales that are considered to be wholesale sales are sales of merchandise for the purposes of resale, do you agree or disagree with that definition?

A. No, sir, I don't. That is a very narrow definition and meaning of wholesale, and I don't believe it is one that is generally accepted.

Q. And you have heard testimony to the effect that all sales of automotive tires to consumers or users are retail sales.

Do you agree or disagree with those classifications?

A. No, I do not agree with that classification—this classification as far as form being too broad in its scope.

Q. Yes. Would you explain the reasons upon which you would narrow such a classification and the considerations that go into proper classification of sales to consumers and users?

A. Yes. In the first place, I believe that retail sales are

generally classified as sales to the ultimate consumer, not sales to anyone who might use the product.

By ultimate consumer we generally mean the final business consumer—the person who uses the product for
1222 his own personal enjoyment.

In connection with the sales—say, a sale to one who will incorporate that product in their own product or their own service, we don't regard those as retail sales.

On the other hand, a wholesale sale would include certainly sales for resale, but would also include sales to industrial distributors, to—I should say, to consumers or professional users of the product.

Q. Would you be able to cite a few authorities in the field of economics and marketing who support your position in that regard?

A. Well, I believe that almost any of the standard texts in the field of marketing will define the terms as I have defined them. Furthermore, you will find the definition in the Marketing Handbook to be in accordance with the definition that I have given. And I believe my definition would also accord with the Standard Industrial Classification Manual definition of Retailing and Wholesaling.

Q. Some reference was made in Dr. Leigh's testimony yesterday about the Standard Industrial Classification Manual.

Can you say whether or not that manual is in com-
1223 mon usage in business and industry generally and whether its definitions are accepted in business and industry?

A. Well, to the best of my knowledge it is widely used, and I certainly use it frequently and regard it as an authoritative source of classification definition.

Q. In the business and industrial field of distribution, it is not at all unusual to find in this area between the manufacturer at the one end, and the consumer of eco-

nomic goods at the other end, firms which occupy a dual role and who sell merchandise both at wholesale and at retail?

A. It certainly is. As a matter of fact, it is my understanding that this is precisely the way that the tire industry has developed.

As I understand it, in the tire industry thirty or forty years ago—perhaps then forty years ago—thirty years ago—you would find few middlemen between the manufacturer and the dealer. Subsequent developments led to gasoline establishments. That is one of the functions of a retailer of automobile tires, and with the absence of a wholesaler between the distributor and the independent dealer, the independent dealers, with a part of their
1224 business being taken away by this newly created distribution outlet, began to move backward in the distribution channel and became primarily—at least partially wholesalers in the sense of selling the industrial and commercial user.

I believe, as a matter of fact, Dr. Leigh makes this point in his chapter with Mr. Beckman that the tire dealer has become a semi-wholesaler of tires rather than a retailer of passenger car tires.

Q. Yes, sir. Your answer, Dr. Moore, leads me to think that I may have mis-stated the question, I intended to ask, or that you misunderstood.

As I recall, I asked you whether or not it is unusual, and your answer indicated to me——

A. Oh.

Q. (Continuing) And your answer indicated you construed my question to be whether or not it is common.

A. I thought you said usual.

Q. Your answer would be it is usual?

A. That is right.

Q. Between the manufacturer and the consumer?

A. That is right.

Q. The firms which occupy a dual role, distributing both at wholesale and at retail?

A. That is right.

1225 Q. Dr. Moore, would there be situations, Dr. Moore, in which identical goods might be sold by the same dealer or distributor, in one transaction to a member of the general public for personal or family consumption, and in the next transaction similar goods to another purchaser not for resale for a non-personal use?

A. Certainly.

Q. Would you comment briefly on the nature and significance of those two types of sales?

A. Well, I think this fits into the definitions that I have already given. If the sale is being made to a person who is buying for purposes of his own personal use and enjoyment, the consumer, I should say, or householder, it would be considered to be a retail sale. If the sale is being made to someone who is then going to resell the product or person who is then going to incorporate that product into a product which he plans to sell later on, then this would be considered a wholesale sale.

And when I say incorporate the product into part of a product, I don't mean necessarily in a physical sense. For example, if tires are sold to a factory and the factory puts these tires on its trucks and uses them in the

1226 process of distribution, then we would regard it as a wholesale sale, sir, because of the tire being incorporated into the product or the price of the distributed product.

Q. Would the same analogy be true as applied to a company which dealt not in a product but in a service, such as transporting merchandise for other people?

A. That is correct. If the buyer plans to add value to

the product before he sells it to the ultimate consumer, then this would not be a retail sale.

Q. And from what you have said, do I correctly infer that in modern-day business it is usual to find a business carrying on simultaneously both wholesale and retail?

A. Well, it certainly isn't uncommon in my experience.

Q. That would be done in present day occurrence?

A. Yes, sir.

Q. Usual in the business field?

A. Yes, sir.

Q. Now, Dr. Moore, I want to ask you now to assume certain facts that I will try to state at this time for the purpose of answering a number of questions.

Will you assume that a company operates a fleet of ten or more trucks in its business of transporting merchandise, from time to time it buys from the defendant in 1227 this action, Steepleton General Tire Company, a portion of the tires that it needs for use in operating its trucks.

How would you classify the sales of such tires by the defendant as to whether they are retail sales or not?

A. Well, I would classify them as non-retail sales. My first inclination might be to classify them as industrial or commercial sales.

Q. Would that comport with the way they are classified in the field of managerial economics?

A. Yes, sir, I think so. But normally I would like to—for my purposes, at least, I would like to make a sharper breakdown than simply retail or wholesale. But I would regard it as a commercial sales, I believe,—industrial sale.

Q. Now, with reference to the standard accepted definitions there as set forth,—for example, the definitions contained in the Standard Industrial Classification and by the Association of Marketing, if I recall it correctly, what classification would they bear by those definitions?

A. Well, if you are simply classifying transactions as either retail or wholesale, they would be in the
1228 wholesale classification. The seller under those circumstances I would regard as industrial distributor, and an industrial distributor is a sub-category of a wholesale function.

Q. Would it be possible for such an industrial distributor to be engaged simultaneously in making sales of tires and tubes and other automotive accessories at retail to members of the general public?

A. Yes, it certainly is possible in the real world for this to be the case. Unfortunately, the activities of the business man are not confined to the classifications that may be set up by ivory tower economists or marketing specialists.

Q. Did you find that in your studies marketing literature and research have taken into account the dual role that is presently being carried on by the distributors in transactions of this type?

A. Yes, I think the most recent work on the subject is Robert Buzzell's book, "Value Added by Industrial Distributors." And he points out in the book the industrial distributor may very well sell to the ultimate consumer as part of his business transaction as well.

Q. In addition to sales to industrial or commercial?

A. In addition to sales to industrial or commercial.
1229 Q. I believe Dr. Leigh yesterday there—Dr. Leigh yesterday mentioned Dr. Buzzell.

You named a book by Doctor—is it Buzzell?

A. Dr. Buzzell, yes.

Q. Does that book bear out and support your position with reference to the fact that these sales to industrial and commercial users are wholesale sales or at least non-retail sales?

A. That is right. He regards the industrial distributor as a wholesaler.

Q. Going back, sir, and to the hypothetical position I posed where the sales were made to a business operating ten or more trucks, would your answer be the same if this business were operating five or more trucks and at the same time five or more passenger cars were being used in the business?

A. Yes, I think my answer would be the same for classification purposes. It depends upon the purpose for which the purchase is made.

Q. Would your answer be the same without regard to the quantity of tires purchased at any one time for such use?

A. Yes. I don't believe the quantity makes a bit of difference.

1230 Q. Do you know whether in the normal course of events such a business establishment would, even if buying a small unit quantity, in a period of time normally purchase in excess of quantities which the ordinary individual would purchase for his own consumption?

A. Well, that question was a little more involved than I followed. Could you restate it?

Q. I think I need to restate it because I am not clear just what I said myself.

With reference to the purchases of tires by the customer we have assumed, this business operating trucks or trucks and passenger cars in the business, would your answer be the same if that purchaser, instead of buying in large quanties at any one time for use in the business, purchased in small lots only?

A. Yes, it would be the same; the answer would be the same.

Q. Then I went beyond that, and perhaps I went too

far. You can clarify this if you think it needs any clarification.

Do you find in the usual course of business that the customer who is buying tires for use on its trucks and cars in a given period of time will buy more such
1231 tires than an ordinary individual for his own personal use?

A. I am sure that that is common.

Q. Now, would I be correct in assuming that if I had used, instead of a trucking company as the example, if I had used, say, a bakery, or a laundry, or a sand and gravel company, or a contractor, or a construction company as the example, that these purchases for use in the business would fall into the same category?

A. That is correct.

Q. With respect to the question of whether the sales of tires such as I have described would be retail or not, would your answer be any different if the customer were a county governmental unit, or a municipality, or a county school district?

A. No, it would not.

Q. It would still fall in the category of being a wholesale sale?

A. That is correct.

Q. Dr. Moore, you heard testimony in the case by Mr. Steepleton and Mrs. Lauderdale regarding national account transactions which are carried on by the defendant, Steepleton General Tire Company.
1232 Based upon that testimony, can you express an opinion as to whether such transactions constitute sales of merchandise by Steepleton General Tire Company?

A. Yes, I would regard them as sales. I think the matter of national account sales is a little bit more complicated than has been indicated in the testimony that I have heard so far. As an economist, I would regard the

national account transaction as involving a number of separate transactions.

As I understand it, when the tires are delivered to Steepleton General Tire Company, there is an exchange of value. He receives the tires and he either pays for those tires or is expected to pay for the tires. So there is a transaction at that moment of time and it would be recorded by an accountant as such.

When the national account customer comes in into the Steepleton store to secure delivery of his tires and the tires are placed on the vehicle, I would assume that there is a second transaction taking place, a transaction between Steepleton General Tire and the General Tire & Rubber Company in effect is receiving the tire back to General Tire & Rubber.

And then I would regard as a third transaction is
1233 taking place when the national account customer in fact pays his bill, pays for the tires to the General Tire & Rubber Company.

So, from an accounting or economic standpoint there is not one transaction taking place when the national account sales occur; there are three—perhaps four transactions occurring, each one of them having economic significance.

Q. For the purpose of determining annual dollar volume by the company of sales of goods and services, would the transfer of this merchandise by Steepleton General Tire Company to the national account customer, plus the commission which is paid Steepleton General Tire Company for handling the transaction, be included in the gross dollar volume of sales?

A. I would think it should be included, yes.

Q. Would that be the type of business accounting you would expect to be followed in the business world?

A. That is right.

Q. In one of your previous answers, Dr. Moore, you developed to some small degree about what I understand to be the history in which the distribution of tires has developed over the period of years.

1234 A. That is correct.

Q. Would the fact that dealers and manufacturers and the trade association in the tire industry that have over a period of years fallen into a practice of calling all these sales which are made to users as retail sales, that only wholesale sales are those which are made for purposes of resale,—would that practice change the economic reality with reference to the correct basis for classifying such transactions?

A. I don't believe so. And again, I think it is a little more complicated than that. From what I have read and from what I have heard here, it seems to me that the industry does normally classify sales not just as retail or wholesale, but normally classify—or very frequently there may be classified in three categories: Tire sales which are analogous to wholesale sales. Commercial sales, which I would call wholesale sales. And finally, retail sales, which category I would agree involves retail sales.

Q. And, naturally, commercial sales which you have described, I understand from your previous testimony, would be classified in the field of business and managerial economics as wholesale rather than retail?

1235 A. That is correct.

Q. And then would you say that the fact that the tire industry and the tire dealers association would classify sales to fleet operators for use in the business as retail sales would be—would actually not change the fact that they are other than retail sales?

A. That is correct. There may be some reason for this classification, but it certainly does not accord with common sense, just to my view.

Q. And with common usage?

A. And with common usage.

Q. With reference to a possible reason for such a classification in the tire industry, could you draw an analogy from the field of the Tennessee Sales Tax Law and regulations?

A. Well, I think the point has been made in here that these transactions are retail transactions—that is, a sale not for resale are retail transactions because this accords with the definition in the sales tax law. But I don't believe that anyone would argue that the sales tax is intended to be exclusively retail sales tax.

As a matter of fact, I participated in legislative
1236 council study on industrial development a few years ago, and this was a matter of quite heated discussion and exchange of views, with the members of the Legislature realizing that the tax, for example, on coal being sold to a manufacturing establishment might very well put that industry at a disadvantage in locating in the State of Tennessee. And so they were at least investigating the business of re-defining the sales tax to include only retail sales in the sense of sales to the ultimate consumer.

Q. Do you recall any considerations that were expressed for leaving the retail sales tax law with the definition that it presently has?

A. Well, as I understand it, the major factor was the financial one, that as presently defined it brings in more money than it would with some other definition of sales.

Q. Now, in the law—the Tennessee sales tax law—do you find that it covers an area not only of sales for ultimate consumption and personal or household use, but those sales which will represent the last transaction in the distribution system, and thus the only—or at least

the last opportunity for the transfer of those goods to be taxed?

1237 A. No, I would not agree with that because, again, when the factory buys tires and places on those distribution trucks, these tires wear out in the normal process of deliveries, and I would expect the factory to recover the price of the tires in the price of the bread sold to the consumer.

So it really isn't the last area of taxation. It is a way of double taxation of this particular transaction.

Q. But it is regarded, as I understand it, as not only the sales tax but the use tax, is that true?

A. I think that is the way it is, the rationalization of the tax, yes.

Mr. Tincher: I have no further questions at this time.

**Cross-Examination,**

By Mr. Burch:

Q. Dr. Moore, you have spoken very interestingly of the academic and classical concept of the differences between various forms of marketing.

There is quite a body of learned support in favor of what you say, isn't there?

A. I hope so.

1238 Q. In addition, the authors that you have mentioned of Beckman and Ingle, their works are substantially the same, are they not?

A. That is correct.

Q. And also of Rowe Alderson?

A. I haven't examined his work.

Q. Beckman and Ingle——

A. That is right.

Q. (Continuing) ——are the outstanding exponents of the same theory you have enunciated so well?

A. That is right.

Q. Did you know that there were a number of reported cases in which Beckman and Ingle's work had been specifically repudiated by the courts as bearing on this question?

A. I understand that their testimony has been questioned.

Q. Now, as a matter of fact, the views of the classical economists—they vary from time to time and there are vogues of thought and belief in economic development, are there not?

A. I am not sure that I understand what you mean by classical economics.

Q. Well, the economic theory that is generally used
1239 by economists in one day or in one generation will not be used the next decade or the next generation, will it, frequently?

A. Well, I can think of a good many theories which Adam Smith enunciated in 1776 which we still adhere to.

Q. Will you answer my question, Doctor. Then we will talk about Adam Smith.

A. I can't answer the question, but I say—Will you restate the question, perhaps?

Q. Isn't it true that there are many economic theories that have been in general acceptance, that with the passage of time their acceptance is lost?

A. I would agree that there are some economic theories.

Q. Well, we will start with Adam Smith, who was a great exponent of laissez faire, and you tell me, Doctor, whether laissez faire is an accepted theory or not?

A. Laissez faire is not a theory. It is a policy derived from certain assumptions of theories and definitions. Laissez faire is not a theory, though.

Q. Are you telling me the general belief of economists in the eighteenth century of the importance of laissez

faire is accepted by the economists of the twentieth century?

1240 A. I would say that when you talk about the belief in laissez faire, you are not talking about economic theory.

Q. Well, let me get to something else, then. This may be one whom you can classify.

You know the works of Ricardo and Malthus?

A. Yes, sir.

Q. The Malthus theory had a great effect on thinking today?

A. Yes.

Q. Do you believe it now?

A. Yes, I think it quite applicable.

Q. Oh, it is?

A. And I think it is quite generally understood that it is. Just let's say——

Q. You know then that Malthus—according to his belief the population increases in geometric progression while the supply of food increases in arithmetic progression. Can you state what is the basis of that theory?

A. You have stated the Malthusian theory.

Q. This is the Malthus theory, the population increases with relation to the increase in the food supply?

A. Yes, Mr. Malthus found that as only a doctrine, and I believe there is a great deal of common knowledge

1241 of validity, if you examine the condition of Asia, at least.

Q. I am asking if the trend of modern-day economics is associated with the Malthusian theory?

A. I accept the basic theory of the Malthusian doctrine as having some consideration about the present day population explosion, then.

Q. And further, on the Bohm-Bawek, on the basis of

that, or take Kaynes' view, do you feel both of which are up to date trends as you say they are?

A. Depends on the aspect you are talking about.

Q. That is right, you agree with some and don't agree with others.

That is the argument of counsel in this lawsuit. No, I am not concerned with the classical view or the theoretical view. I am concerned in this lawsuit with what is wholesale and what is retail and recognized in the tire industry.

Now, in my subsequent questions, will you limit yourself to that?

A. May I ask a question for clarification purposes?

Q. At this time you may, sir.

A. When you say "in the tire industry," that
1242 means "by the tire industry"?

Q. By the tire industry?

A. Yes, sir.

Q. Now, let's say in the tire industry, recognized in the tire industry. That is the language of the statute.

Now, one of the answers you gave my friend Mr. Tincher here—, and he phrased the question this way himself—he said, "Would the fact that a practice is regarded as so-and-so in the tire industry affect the essential economics so as to make it different from what you have said?"

And you said of course that it would not.

Did you realize that the statutes of the United States state not what are the economic facts of the practice in the tire industry, but what is recognized—recognized—not what is, but what is recognized?

Do you make that distinction?

A. Yes, sir.

Q. Very well. Now, do you profess to the Court to be sufficiently learned and sufficiently expert to testify as to

what recognition is given these practices in the tire industry?

A. I think I have a fair understanding of what the
1243 tire industry does in these matters.

Q. I didn't ask you about what it does. I asked you about recognition of practices in the tire industry. Now, do you know about ordinary recognition of these practices, or can you qualify as an expert, or shall we take up the time?

A. I have listened to a great deal of testimony about this, and I have read a number of depositions by experts in the tire industry or people who are engaged in the tire industry.

Q. Do you have any knowledge about practices in the tire industry except what you have heard while you sat as a witness for whom the rule was waived in this courtroom and the depositions that were taken that you have read?

A. I have read other material about the tire industry.

Q. Has it been published by people who were members of the tire industry?

A. Some of it by people who were members of the tire industry.

Q. Just answer the question. Basically, what type of material did you have?

A. I answered your question there about—well, as
1244 testified, some of this has been in connection with the depositions which have been prepared.

Q. Now, look, Dr. Moore, we have been here a long time, and I don't want to put a lot of time and I don't want to embarrass you, and I don't want to take the Court's time.

Do you consider that you are sufficiently expert on recognition in the tire industry to state an opinion about it?

A. Well, I will have to take what you might call an academic point of view. I have been studying economics and the managerial aspect of economics for a long time. One of the purposes of that study is to derive general principles which are universally applicable. I believe that I have done that. And I believe that I have made enough study of the tire industry so that I can see the relationship between the general principles and the applications to the tire industry.

Q. Do you recognize that different industries recognized different concepts as to the distinction between wholesaling and retailing?

A. I believe that I would say that different industries at times use a different concept of wholesaling and retailing, yes.

1245 Q. Now, what industries would your definition of wholesaling and retailing not have validity for?

A. I think they would be valid for any industry.

Q. Well, now Doctor, you just told me that different industries have different conceptions of wholesaling and retailing—recognize different criteria for wholesaling and retailing.

A. I believe that I——

Q. Now, which ones can you apply——

A. I believe I said that they use different concepts.

Q. Well, which industries use different concepts from the ones which you say are proper?

A. Well, I believe that you would probably find different concepts by a member of the oil industry, for example, because of a different marketing structure.

Q. And what other industries?

A. I believe in the building materials industry there is a different usage.

Q. Come on, some more. Now, what is the distinction in the oil industry?

A. Between retail and wholesale?

Mr. Burch: Right.

A. Well, this depends on—in the oil industry more
1246 as to the way you define it in the way of purchaser in the industry.

Q. The way you define it. Does that have validity—the way you define it?

A. I don't believe that it has overriding validity. No, I don't believe that it has validity—period.

Q. Now, you believe that no matter how the oil industry defines its practice, your theory has validity in the practice, as well?

A. No, I believe it is a little more complicated. Those sales cover classes of resale—wholesale. Or wholesale sales cover further subdivisions.

Q. Who is the best judge of how the division should be made, the theoretical economist or the person engaged in the industry?

A. I believe such person in the industry is so closely associated he would not be able to think clearly.

Q. Do you know that Congress happened to have given authority to define it to the person in the industry, not the academic theory?

A. I have read the interpretative bulletin. I haven't read the law itself.

Mr. Burch: Is that——

(Discussion between counsel.)

1247 Mr. Burch: I am sorry for the interruption.

A. I have read the interpretative bulletin, I haven't read the law itself. It says the interpretation shall be that interpretation in the industry. But "by the industry"—nothing to indicate the consideration that due weight should be given the interpretation there, and so forth.

Q. Now, you have got the interpretative bulletin before you?

A. I have the September 2, 1961, version.

Q. Is that the one you read? Which one did you read?

A. I wasn't reading any. I just gave you my view of what the bulletin said.

Q. But the one you have got that you have been looking at—what is the date of it? Now, let's look at one—let's have the date.

A. This one is September 2, 1961.

Q. All right, what is the other one?

A. The other one is January first, I guess, 1960, including amendments up to January 31, 1961.

Q. Now, which one have you been looking at in making your opinions?

A. The September 2, 1961, version.

1248 Q. Now, let's go to the other one, which is the one that has to do with this case—which the Government says has to do with it.

Now, follow me, if you please, and let's go down to—first, look at page 33, sales to fleet accounts.

Excuse me. Have you got it?

A. Yes, sir.

Q. (Reading) "Sales to fleet accounts at wholesale prices: As used in this section, a 'fleet discount' is a customer operating five or more automobiles or trucks for business purposes. Wholesale prices for tires, tubes, and accessories are prices equivalent to, or less than, those typically charged on sales for resale. If the establishment makes no sales of passenger car tires for resale, the wholesale price of such tires will be taken to be the price typically charged in the area on sales of truck tires to fleet accounts operating 10 or more commercial vehicles."

Now, will you please tell me any source, any reference, any published material, or any testimony, or any knowledge that you have of any source coming from anyone in the tire industry that recognize that classification?

A. The only person that I—the only thing that I
1249 have read that indicated this classification is Dr. Leigh's article on Marketing Channels.

Q. Well, Dr. Leigh——?

A. He is not in the tire industry, no.

Q. Not in the tire industry?

A. He is closer to it than I am, but he is not in it.

Q. Is that all you can cite?

A. That is the only thing I can cite.

Q. And were you advised that Dr. Leigh testified under oath from this stand, subject to rigorous cross-examination, that it was true that was the classical view or theoretical view, the economic and correct view that is recognized and practiced in each industry is diametrically opposed to it?

A. No, sir, I don't know what Dr. Leigh testified.

Q. Well, do you know of any authority to support the contention you have mentioned?

A. No.

Q. Now, Doctor, I think I know the answer to this, but I want to get it in the record.

You never have been employed in the tire industry, have you?

A. No, sir.

1250 Q. You have never conducted or attended seminars in the tire industry?

A. No.

Q. Never written any articles on tire industry subjects, have you?

A. No.

Q. You have never been employed as a consultant by any of the companies in the tire industry?

A. No.

Q. You don't subscribe to any publications on the tire industry?

A. No, sir.

Q. Are you familiar with the idiom of the tire industry?

A. I believe so, in some aspects at least.

Q. What is an OB take-off?

A. No, I don't know it.

Q. What is the MTO?

A. I don't know that.

Q. So when you see price schedules for that, you don't even know what they mean, then?

A. That is right.

Q. If I told you MTO was manufacturer's take-off, you would recognize that is a very important concept to
1251 a merchant in the tire industry, would you not?

A. Yes.

Q. Yet if you had seen it, you would not know what it meant, would you?

A. That is right.

Q. Do you identify a national account sale as having anything to do with drop shipment?

A. I think to a sense it is analogous to a drop shipment, yes.

Q. Your definition of national account sales and the way you have described the four economic concepts that enter into it, do you harmonize those four economic concepts with a drop shipment?

A. Well, I think we are looking at it from two different points of view, when we are talking about the transaction way of thinking and the drop shipment.

The drop shipment is simply something that describes a method of delivery rather than a sale in which the transaction is——

Q. So there are two sides to look at this?

A. If by sides you mean——

Q. Two viewpoints.

A. ——aspects. Not viewpoint, but aspects of the
1252 transaction.

Q. Well, if the drop shipment, it is a drop shipment all around?

A. Well, drop shipment all around for it—well, I am talking about whether you might account for it in the accounting sense of the transaction, whether be drop shipment transaction or some other kind of transaction. I would say that the transaction does bear very definite resemblance to a drop shipment transaction.

Q. So if an accountant in setting up the books set it up as a drop shipment, will it actually be a drop shipment, or is it an accounting technique? You wouldn't challenge that, would you?

A. If in fact he accounted for all the aspects of the transaction I have indicated.

Q. So if you call it a drop shipment, or if you call it a sale to General Tire Company in this particular case, or if you call it not a sale because no sales tax was entered or collected, either one would be technically correct from the accounting standpoint, would it not?

A. Well, from the accounting standpoint is of course a record of the aspects of the transaction. He should, for example, certainly record the fact that initially
1253 it is a sale by General Tire Company to the tire distributor.

Q. Well, of course, that was done in this case, as you know.

But, now, in your opinion, should that go in the annual volume of business or should it be entered in his sales?

A. Yes, I think it should.

Q. And you think——

A. (Continuing) I also believe—Well, go ahead.

Q. You would think that even though the testimony is the universal practice—the standard method of accounting in the tire industry is to the contrary?

A. Yes, I believe I would. I would think there that is the way it should be done.

Q. You would realize, too, that what you say should be done and recognized in the tire industry is different?

A. What is done in the tire industry is different, yes.

Q. So there is a difference there between what you say theoretically ought to be done and what is recognized as ought to be done in the tire industry. There is that difference, isn't there?

A. Assuming that they do what they recognize ought to be done, there is that difference, yes, sir.

1254 Q. Well, we all must go by the testimony. And since there is no other, I ask you to assume that the standard, universal accounting practice in the tire industry is not to treat those as sales, and they are charged back against the bonus rendition for sales.

If that is correct in the testimony, you would admit there is a difference between the view you are telling us——

A. That is right.

Q. (Continuing) ——and what is recognized in the tire industry?

A. That is right.

The Court: Suppose we have a ten minute recess, gentlemen.

(Recess.)

Q. Dr. Moore, to be as brief as I can, as I understand the substance of your testimony is that sales to other than the ultimate consumers—sales to people other than individuals who personally use or enjoy the sold article—should be classified as wholesale?

A. That is correct.

Q. I take it that you would disagree with this statement:

"The services of hotels, restaurants, repair garages,
1255 filling stations and the like, whether rendered to private householders or to business customers, will

be retail so long as they are regarded as retail services in such trade."

You wouldn't agree with that, would you?

A. I would say that there ought to be a distinction, that is right.

Q. You wouldn't agree that a sale to a repair garage who repaired—the sale to a repair garage—to a commercial account—that would be wholesale?

A. That would be a wholesale transaction.

Q. Now, would it affect your view any if I told you I was quoting from the Congressional Record, from Mr. Lucas who made that statement at the time he introduced the 1949 Amendment?

A. Would it change my opinion as to how it should be classified?

Mr. Burch: Yes.

A. No.

Q. So either you are wrong or Mr. Lucas is wrong?

A. I don't know if it is a matter of being wrong; it is a matter of having different definitions.

Q. Well, you are right. I am wrong. It is a matter of having different definitions?

1256 A. That is right.

Q. You don't have to say who is right or wrong.

"It means that any sale or service to a private consumer, businessman, who does not purchase to resell, or a farmer, will have to be treated by the Administrator and courts as a retail sale or service so long as such sale or service is recognized in the particular industry as a retail sale or service.

"Thus a sale by a farm implement dealer of farm machinery to the farmer will be retail irrespective of the fact that in some cases farm machinery may be sold to the farmer at a discount, if the sale is regarded as retail in such industry.

"Likewise, the services of hotels, restaurants, repair garages, filling stations and the like, whether rendered to private householders or to business customers, are retail so long as they are regarded as retail services in such trade.

"No longer will it be possible for the Administrator to rule, as he has under the present law—that if an automobile dealer sells a truck to the local butcher, bakery, or grocer the sale is not retail, but if he sells a passenger car to a private consumer the sale
1257 is retail. These and other like discriminatory interpretations of the Administrator are eliminated under the Amendment. Under the Amendment the courts would decide the question of what sales or services are recognized as retail in the particular industry."

Now, you are in disagreement with that statement, aren't you?

A. Yes, I think I am. From what I have read, I think I know quite well the traditional definition in the tire industry are not simply retail or wholesale. It is retail, commercial and dealer sales. And it is simply a question of whether you are going to allocate that class composed of sales—who may be the industrial—whether you are going to regard it retail or wholesale.

Q. Now, an assumption that every witness on the stand —every single one testified that in the tire industry the component of commercial sales is regarded as retail—now, assuming that, would you be in agreement with the consensus on that point, you would be individually opposed to it?

A. I would want to know whether these were—did you say these were to people in the industry?

Q. Every one in industry there, everyone who testified.

1258 A. I would say necessarily, to answer it then.

Q. You would say necessarily to answer it then?

A. Necessarily.

Q. And yet you state that you have no information about the tire industry except what you have heard from the witnesses in this case and what you have read in the depositions?

A. That is right. But I am very puzzled about some of that testimony.

Q. Well, in all the depositions that you read, did you find a deposition of a single individual in the tire industry who did not say that consumers sales in that industry were recognized as retail?

Did you find a single one?

A. I don't believe that they remarked on that particular question. But I think it is quite true that all consumer sales would be classified by the people in the industry who have presented testimony in deposition that it should be retail—classified as a retail sale.

Q. Now, I want to get away from the industry a minute, and I want to get back to generalities.

Under your theory, any sale except for the enjoyment and pleasure and personal consumption of the purchaser would be wholesale, wouldn't it?

1259 A. That is correct.

Q. So a farmer who buys a tractor, even if he just has one tractor, that would be wholesale?

A. Should be.

Q. Should be wholesale. Now, if a man buys something for his own personal enjoyment, that you say is retail, but if he buys it as equipment to perform his business or his profession and is using it, that is wholesale?

A. If it is used in his business or profession, yes.

Q. Then it is wholesale?

A. That is right.

Q. Well, let's just see how ridiculous that is. Say you go down—where do you live?

A. Knoxville.

Q. Say you go down to the bookstore there on Gay Street—and I don't assume that doctors of philosophy do this sort of thing, it is just lawyers like me and Mr. Ray—but suppose you go there and buy yourself a real sexy novel there you are going to entertain yourself with, that is a retail sale, isn't it?

A. Yes.

Q. But in the same book store, in the same transaction, you buy some book to help you in your teaching, like something you brought down with you, that is a whole-
1260 sale, isn't it?

A. That is correct.

Q. Now, you say that makes sense and could be administered by anybody short of God?

A. No, I don't claim that makes sense. I say that is the way the transaction ought to be handled. I obviously recognize there is a matter of some kinds of set up—administrative rules that might differ from these definitions, but I think we should begin with the definitions rather than extracting the definitions from them.

Q. Do you, of course, know that that is what Congress actually attempted to do, exactly what you have suggested, that this recognizes that they cannot characterize everything theoretically and you must have arbitrary administrative rules, and prescribed that if it is recognized in the industry that is what we will treat it, no matter what it may be theoretically?

They recognized the need for something——

A. That is right. I think the fleet account situation represents this so really. You would not treat a sale—sale of

tires for people who only have one truck as a fleet
1261 account sale. That is a practical exception—the general purpose.

Q. You say something. But that is not what Congress said. Congress said the industry ought to classify it. You say the Administrator ought to be allowed to classify it, don't you?

A. No, I don't know who ought to classify this. This is not an area in which I have a professional opinion.

Q. Well, from what you have learned, you know that the way the industry classifies it and the way the interpretative bulletin classified it is different, isn't it?

A. Yes, sir.

* * * * * * *

1262 **MISS SARAH GINSBERG,**

having been first duly sworn, testified as follows:

**Direct Examination.**

By Mr. Tincher:

Q. Will you state your name, please?

A. Sarah Ginsberg.

Q. Give your place of residence and by whom you are employed, Miss Ginsberg.

A. I am employed—I live in Washington, D. C., and I am employed by the Wage and Hour and Public Contracts Divisions of the United States Department of Labor.

Q. And for how long have you been employed in the Department of Labor?

A. Since November, 1938.

Q. Will you speak up, hold your voice up, please?

A. Since November, 1938.

Q. What is your position there at present?

A. I am Chief of Administrative Analysis and Litigation Assistance Section of the Research and Statistics Branch.

*Testimony of Miss Sarah Ginsberg*

Q. Do you have here a duplicate statement of your qualifications and experience, Miss Ginsberg?

A. Yes, that is what this is.

Q. I have already handed Mr. Burch a copy of this
1263 statement. And without reading it, would you simply summarize briefly the work which you have done in recent years in the field of research and economics?

A. Well, this goes back to 1930 to '36, when I was head of the Research Department of Atlanta University School of Social Work, and taught Statistics, Principles and Methods of Research, Techniques of Community Surveys, and Labor Legislation, and conducted community surveys.

From March, 1936, to June, 1936, I was assistant city supervisor in charge of field work in Atlanta, Georgia, for the Urban Survey of Consumers Purchases——

Mr. Burch: Excuse me, Miss Ginsberg.

This is quite lengthy, and it will be agreeable to me, Mr. Tincher, to put it in the record and treat it as read, as an exhibit.

Q. May we enter that as an exhibit to your testimony?

A. Yes.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 16, and same will be found among the exhibits in the cause.)

Mr. Tincher: Exhibit Number 16.

Q. Miss Ginsberg, in your position as an economist
1264 and as Chief of the Section of Administrative Analysis and Litigation Assistance and Statistics, have you compiled from the various accepted authorities some definitions of the terms "wholesale" and "retail"?

A. Yes, I have. I have been doing that for many years.

Q. I hand you here some sheets that you prepared and ask you if you can read from those sheets the definition of

wholesale trade and retail trade as set forth in the Standard Industrial Classification Manual.

A. Yes, sir.

The Court: Now, I have no objection to Miss Ginsberg reading this. But I want to know what it is for—the standpoint of whether it is within the tire industry. I want to identify it. Don't know whether it has something to do with the witness——

A. The Standard Industrial Classification Manual definition of wholesale trade and retail trade——

The Court: I am sorry to be so thickheaded.

But I don't know what the Standard Industrial Classification Manual is. I wish somebody would tell me.

A. I could. That contains the definitions——

1265 Mr. Tincher: Just a minute, Miss Ginsberg.

Dr. Leigh testified to the Standard Industrial Classification. And it was identified also in some of the deposition testimony which the defendants have filed and was referred to by the previous witness, Dr. Moore, as having general acceptance and usage in the business and economic fields.

The Court: I repeat, I would like for somebody to tell me who publishes it.

If it is published by the Government, what department. I would like to know that.

Miss Ginsberg, can you tell us the answer?

A. Yes, I have got it all written out here.

The Standard Industrial Classification was developed for use——

Well, it is published by the Bureau of the Budget, or Office of Printing of the United States.

Well, the Standard Industrial Classification was developed for use in the classification of establishments by type of activity in which engaged; for purposes of facilitating the collection, tabulation, presentation, and analysis

of data relating to establishments; and for promot-
1266 ing uniformity and comparability in the presenta-
tion of statistical data collected by various agencies of the United States Government, State agencies, trade associations, and private research organizations.

The Classification is intended to cover the entire field of economic activities——

The Court: I have got it. I understand now. Go ahead.

Q. Would you now, Miss Ginsberg, read the definitions of "wholesale trade" and "retail trade" as contained in the Standard Industrial Classification Manual?

A. Yes, sir. (Reading:)

"This division includes establishments or places of business primarily engaged in selling merchandise to retailers; to industrial, commercial, institutional, or professional users; or to other wholesalers; or acting as agents in buying merchandise for or selling merchandise to such persons or companies. The principal types of establishments included are: (1) merchant wholesalers—wholesalers who take title to the goods they sell such as wholesale merchants or jobbers, industrial distributors, voluntary group
wholesalers, exporters, importers, cash-and-carry
1267 wholesalers, drop shippers, wagon distributors, retailer cooperative warehouses, terminal elevators, and cooperative buying associations; (2) sales branches and sales offices (but not retail stores) maintained by manufacturing or mining enterprises apart from their plants or mines for the purpose of marketing their products; (3) agents, merchandise or commodity brokers, and commission merchants; (4) petroleum bulk stations; and (5) assemblers, buyers, and associations engaged in the cooperative marketing of farm products.

"The chief functions of establishments included in wholesale trade are selling goods to trading establishments,

or to industrial, commercial, institutional, and professional users; and bringing buyer and seller together."

Mr. Burch: If Your Honor please, there is a good deal of this, and I have no objection whatever to letting Miss Ginsberg identify it and Mr. Tincher read whatever parts he thinks relevant, or treat it as all read, or have the right to——

Q. I believe that ends the definition of wholesale
1268 trade, doesn't it, Miss Ginsberg?

A. No, no, sir; there is a little bit more.

Q. Well, would you read the rest of it?

A. O. K. (Reading:)

". . . and bringing buyer and seller together. In addition to selling, functions frequently performed by wholesale establishments include maintaining inventories of goods; extending credit physically assembling, sorting, and grading goods in large lots, breaking bulk and redistribution in smaller lots; delivery; refrigeration; and various types of promotion, such as advertising and label designing."

Q. All right, now, from the same Standard Classification Manual, would you read the definition of "retail trade"?

A. Yes, sir. (Reading:)

"Retail trade includes establishments engaged in selling merchandise for personal, household, or farm consumption, and rendering services incidental to the sale of the goods. In general, retail establishments are classified by kind of business according to the principal lines of commodities sold (groceries, hardware, etc.), or the usual trade designation (drug store, cigar store, etc.).

1269 "Some of the important characteristics of retail trade establishments are: the establishment is usually a place of business and is engaged in activities to attract the general public to buy; the establishment buys or receives merchandise as well as sells; the establish-

ment may process its products, but such processing is incidental or subordinate to selling; the establishment is considered as retail in the trade; and the establishment sells to customers for personal, household or farm use. Not all of these characteristics need be present and some are modified by trade practice.

"Buying of goods for resale to the consumer is a characteristic of retail trade establishments that particularly distinguishes them from the agricultural and extractive industries. For example, farmers who sell only their own produce at or from the point of production are not classified as retailers.

"Processing incidental or subordinate to selling often is conducted at retail stores. For example, restau-
1270 rants prepare meals, and feed stores grind feed. Retail establishments of manufacturing concerns are included in retail trade.

"For the most part, establishments engaged in retail trade sell merchandise to the general public for personal or household consumption. Certain exceptions to this general rule are made necessary by trade practices. For example, retail lumber yards are included in Retail Trade despite the fact that a high proportion of their sales are made to contractors; and establishments selling feed, fertilizer, machinery, etc., to farmers are also included in Retail Trade. Chain store warehouses are considered auxiliary to the retail establishment served and are classified on the basis of the industrial activity carried on by such retail stores.

"Establishments engaged in selling to the general public, from displayed merchandise, products such as typewriters, stationery, or gasoline, are classified in retail trade even though such products may not be used for personal or household consumption. However, establish-

ments that sell these products only to institutional
1271 or industrial users and establishments that sell similar merchandise for use exclusively by business establishments are not classified in Retail Trade."

Mr. Tincher: For the aid of the reporter and for whatever other use it might have, I will offer this in as an exhibit to the testimony of Miss Ginsberg.

The Court: For the aid of the reporter or the judge?

Mr. Tincher: Certainly Your Honor may use it.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 17, and same will be found among the exhibits in the cause.)

Q. Miss Ginsberg, I shall not ask you to read or state any additional definitions, but I will hand you a sheet here which you have prepared and which I believe contains excerpts of definitions taken from the Census of Business, is that correct?

A. That is correct.

Q. Are the definitions contained there and the defi-
1272 nitions which are found in the publication of the United States Business Census organization consistent with the definitions you have read from the Standard Industrial Classification Manual?

A. Yes, they are. The census—the Bureau of Census uses the SIC in all its definitions.

Q. Then will you make the sheet of paper you are now holding an exhibit to your testimony?

Mr. Burch: Which one is it, just so I can follow it?

(Counsel confer.)

Mr. Burch: Let me see it so I can follow it.

Mr. Ray: That will be Plaintiff's Exhibit 18.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 18, and same will be found among the exhibits in the cause.)

Q. Miss Ginsberg, have you also compiled definitions

relating to "wholesale" and "retail" and "ultimate consumer" from other publications of the United States Government?

A. Yes.

Q. I will ask you, Miss Ginsberg, to make that as
1273 Exhibit 19.

Mr. Burch: O. K. I have it.

Q. (Continuing) The collection of definitions which you have identified.

And for clarification, is there also included with this collection of definitions some which are headed some concepts of wholesaling and retailing in marketing literature?

A. Yes, sir.

Mr. Tincher: Those sheets are offered as Plaintiff's Collective Exhibit 19.

(Thereupon said documents were accordingly marked as Plaintiff's Collective Exhibit 19, and same will be found among the exhibits in the cause.)

Q. Dr. Leigh in his testimony yesterday referred to Dr. Rowe Alderson as an author who has discussed distribution and retailing operations.

Could you tell the Court what you have found Dr. Rowe Alderson wrote about this subject?

A. I can.

This is from Rowe Alderson, writing on the subject—it is Rowe Alderson in his book called "Marketing," which was published in 1949, by checking this
1274 revised edition—'49, page 121.

That says:

"The vending of goods to industrial or commercial houses and to institutional buyers for use in their enterprises is not a retail operation nor are the firms which operate in this type of activity retailers."

Q. Thank you. Mr. Burch in examining some witness referred to National Recovery Administration definitions.

I will hand you two sheets and ask you if you have compiled on those sheets NRA Code definitions relating to tire manufacturers and the retail tire and battery trade.

A. That is what this is.

Mr. Tincher: I wish to make this Plaintiff's Exhibit 20.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 20, and same will be found among the exhibits in the cause.)

Q. Miss Ginsberg, before we go further, have you found any definitions in any of the sources that you have referred to so far that are inconsistent with the definitions of "wholesale trade" and "retail trade" as
1275 stated by you from the Standard Industrial Classification Manual?

A. The codes are slightly different, but they say the same thing.

Q. In other words, the definitions in their meaning as you interpret them are consistent?

A. Yes, that is right.

Q. Miss Ginsberg, in the years immediately following the 1949 amendments to the Fair Labor Standards Act, did you prepare any economic studies relating to the automotive tire industry?

A. Yes, sir, I prepared material for use of the Divisions on the automotive tire industry.

Q. Did you prepare during the same period economic studies in the motor fuel, tires, batteries, and accessories field?

A. Yes, sir.

Q. Will you tell us whether you made any studies for use by members of the Administrator's staff of the Department of Labor or members of the Solicitor's staff to ascertain what classes of sales are recognized as retail sales or services in the automotive tire industry?

A. Yes, sir, I did.

1276 Q. And did you compile any material for such special purpose in the work of making a determination to be published as to what is recognized as retail sales in the automotive tire industry?

A. Yes, sir, I did.

Q. And are you familiar with the determination as was finally adopted and published in the interpretative bulletin, Part 779 Code of Federal Regulations——

A. Yes.

Q. (Continuing) ——That has been filed as Exhibit 6 in this case?

A. Yes, sir, I am familiar.

Q. In your study and preparation of material for use of the staff and others in the department, did you examine materials that were submitted by the National Tire Dealers and Retreaders Association and the tire manufacturers which they submitted to support their contention that all sales to tire users as distinguished from resellers were considered by the tire industry to be retail sales?

A. Yes, sir, I did, some of them.

Q. Well, will you state, if you will, what factors caused the representatives of the Administrator's
1277 staff and the Administrator not to accept the contentions of the tire association—the tire dealers association and the tire industry people in this regard?

A. Well, one of the tests was that the legislative history indicated that it was the responsibility of the Administrator to make the determination, and that the industry's definitions—what the industry's definitions were in the particular industry's definition of what was a retail sale in their industry—in other words, we weren't to accept the contention of the industry and let them make their own definition or decide for themselves what was at retail and what was at wholesale?

Mr. Tincher: All right.

A. (Continuing) It was the responsibility of the Administrator, and he was to make thorough studies in all —all of the aspects of this industry before he made the determination.

Q. All right. In that regard, did you examine and prepare materials relating to the Congressional intent, the legislative history relating to the 1949 amendments in the particular area of what is recognized as retail sales in the industry?

A. Yes, sir.

1278 Q. I hand you some papers stapled together, which is headed "The Holland Amendment."

Will you state whether or not that is compiled from the Congressional Record?

A. Yes, sir.

Q. As an indication of what the Congressional intent was with reference to this question of what is recognized as retail in a particular industry?

A. Yes, sir.

Mr. Tincher: I wish that to be marked, and it is offered in evidence as Plaintiff's Exhibit 21, with the heading "Holland Amendment."

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 21, and same will be found among the exhibits in the cause.)

Q. Without asking you to read or summarize what is on that sheet, Miss Ginsberg, did you find any mention in this Congressional history of the '49 amendments—any mention of fleet sales or how they were to be treated?

Mr. Burch: What is the question—of what sales?

1279 Mr. Tincher: Fleet sales.

Q. (Continuing) Nothing in what I just handed you?

A. No, sir.

Q. Is that in some other portion or collection of materials which you made?

A. Yes. I don't know whether you have it there or not.

Q. But, at any rate, it is a part of the Congressional Record which you made up——?

A. Yes.

Q. (Continuing) Or debates?

A. That is right. There is information there, a little information in which fleet sales are mentioned.

Mr. Mitchell: Did I understand her answer to be that the Congressional Record contained some discussion of how fleet sales are to be handled?

A. A little bit, yes, sir.

Mr. Mitchell: Is that the testimony?

A. A little bit, yes, sir.

Mr. Mitchell: It does contain it?

A. Yes, sir.

Mr. Mitchell: Could you designate whether that is in any of the material that has already come in?

1280 A. No, sir, it is not in there.

Mr. Burch: It would be very material.

Mr. Mitchell: If I might on that, Mr. Tincher, do you plan to offer whatever material Miss Ginsberg has in mind?

Mr. Tincher: We certainly will want to call it to the attention of the Court.

Mr. Mitchell: All right.

Mr. Tincher: But I believe Miss Ginsberg has not—among the materials we have here—has not excerpted that portion——

Mr. Mitchell: But you do plan to have it identified, so we will know?

Mr. Tincher: If she does not identify it, let's say we will

show—you will have an opportunity to read it and try to answer it.

Q. Miss Ginsberg, do you know where you have the materials which you excerpted from the Congressional Record that would bear on this discussion of fleet sales?

A. I don't know whether I have it in the briefcase, or my office, or my hotel room. But I do have copies of it.

Let's see what I have in my miscellaneous material.

1281 (Witness checks documents.)

Here it is.

Q. Would you simply identify that portion of the Congressional Record——

Mr. Burch: May I see it, please?

Hand it all in there.

Mr. Ray: Do you have extra copies of this?

A. Yes.

Mr. Ray: Could we have them?

A. I don't know whether I have an extra copy here, but I shall look.

The Court: Let's see——.

Mr. Burch: By all means, let's have it there.

Q. Do you have a page there dated August 30, 1949?

A. Here it is.

Q. 95 Congressional Record?

A. Yes, here it is.

Mr. Mitchell: What page of the Congressional Record was that, Marvin?

Mr. Tincher: 12,497 continued. It came up with Mr. Pepper's question to Senator Holland.

I believe, then, for the purposes of clarification or

1282 to help the court, I will ask that this excerpt from the Congressional Record be made exhibit—Plaintiff's Exhibit 22.

(Thereupon said document was accordingly marked as

Plaintiff's Exhibit 22, and same will be found among the exhibits in the cause.)

Q. Now, I understand, Miss Ginsberg, that on the basis of the legislative history of the 1949 amendments, the Administrator, in arriving at the determination which was finally published in the bulletin as regards the automotive tire industry, took into account the materials that were submitted by the tire association and by the tire industry, and the Congressional intent as shown by the debates in Congress, and the accepted economic and marketing theories, is that correct?

A. That is correct.

Q. Now, would you state whether any analogous areas of marketing were considered in regard to a determination for the tire distributing industry? And, if so, what ones were considered?

A. Well, they studied the automobile industry—automobile trade, I mean, and the marketing of parts and accessories, batteries, and so forth.

1283 Q. Did you find in the economic studies you prepared that the marketing channels and practices with reference to automotive parts and accessories, batteries, and so forth, was similar to that of automotive tire distribution?

A. They were mostly similar. I don't remember if any differences offhand or not.

Q. Well, insofar as your studies were concerned, and did you study the system being used by the batteries and accessories and parts distribution industry?

A. Yes, sir.

Q. Did you find in that industry, namely, automobile parts, batteries and accessories, that there was any practice in the industry or any recognition in the industry that sales to fleet operators for business uses were retail sales?

A. In the parts and accessories sales to business users and fleets were considered wholesale sales.

Q. Any recognition thereof that they were retail sales, or called retail sales?

A. No, sir.

Q. In the testimony of Dr. Moore this morning, some reference was made to the history by which the distribution of automotive tires developed over the years.

1284 Did you prepare any study of the history of the automotive tire distribution, Miss Ginsberg?

A. Yes, sir, I did. This is a short history—relatively short history of the distribution of tires taken from various authentic sources.

Q. Did you, in preparing that and on the sheets there, and in all of those, put footnotes there to that identifying the source from which you obtained information?

A. Yes, sir, I did, I identified the source.

Mr. Tincher: I wish to make that Exhibit number 23.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 23, and same will be found among the exhibits in the cause.)

Q. I wish you would briefly summarize that from memory or from your notes, Miss Ginsberg?

A. Then I have some notes which Iwrote on it somewhere.

Q. I think the Court might like to hear this, a little more fuller exposition of how this use of the term "retail" in connection with distribution of tires to the users, fleet accounts, commercial accounts, and so forth—a little more full than Dr. Moore gave.

1285 Will you please——

A. The activities of the tire dealers have changed considerably over the years since the automobile first came into use, but the terminology of the industry has remained the same. Thus, the use of the term "retail"

is now habitual rather than descriptive of the current activities of the tire and tube distributor.

Since the automobile came into use before the truck, the original replacement tires were sold to automobile owners. Replacement tires were first by bicycle and carriage shops, vulcanizers, bicycle repairmen, garages, general stores, hardware stores, and so forth.

Then, to insure that replacement tires would be available to all car owners, the tire manufacturers began franchising dealers. These dealers sold tires primarily to individual car owners, and were of course retailers.

After a while some of the larger dealers centrally located were franchised to sell to smaller dealers for retail. Thus they went into the wholesale business.

The truck did not come into general use until some time after the automobile. The first trucks were
1286 converted automobiles. The early truck tires were solid. About 1914 Goodyear began replacing solid tires with pneumatic tires, and later they were improved, making it possible to carry heavier loads. Truck tires were sold by the dealers of automobile tires. As heavier and more specialized tires were developed, the dealers also sold these. But at first the manufacturers made sales to large fleet owners. Later, the dealers began selling to fleet owners. Now the manufacturers are selling to national accounts and the dealers are also selling to fleet owners.

In the meanwhile, more and more automobile tires have come to be handled by a variety of dealers, not only garages, gasoline stations, automobile dealers, and auto repair shops, but also department stores, chain stores, discount houses and the big cooperative markets are selling automobile tires.

As a result, the large tire and tube dealers are concentrating on truck tires, all kinds of large, specialized

industrial and commercial truck tires, sales to fleet owners and sales for resale. However, the industry continues to call these people retailers.

Q. As a result of——

Mr. Burch: What is the last, please, ma'am?

1287 A. The industry of course continues to call these people retailers.

Mr. Mitchell: Will you clarify whether that is the last thing you are quoting, or whether this is your own addition there?

A. The last that—the last addition there——?

Mr. Mitchell: The quote should be before——

A. I am not quoting anything. This is what I wrote as a summary of it all and it contains excerpts—contains, for instance, from the various sources which I mentioned.

Mr. Burch: Thank you. I understand.

Q. As a result of the practice which you have described that has developed over the years in the distribution of tires, have you found from your study of the literature and the discussions that there has developed a confusion in the tire distribution industry?

A. Yes, every once in a while—and this is one example I especially noted. This is found in a letter to the Honorable Aime J. Forand, Chairman of the Subcommittee on Excise Taxes, House Ways and Means Committee, Washington, D. C., dated November 20, 1956, which was printed in Part 2 of the report of the Hearings before a Subcommittee——

Mr. Burch: If Your Honor please, I don't object

1288 to this, but I just—the latitude we are going—this is practically ten years after the amendment, and is hearsay, but put it in for what it is worth.

Mr. Tincher: I think it is very in point.

Mr. Burch: Put it in for what it is worth.

A. (Continuing) Well, in Part 2 of the report of the Hearings before a Subcommittee of The Select Commit-

tee on Small Business of the U. S. Senate, 86th Congress, Second Session, on Dual Distribution in the Automotive Tire Industry, by R. H. Miner—signed R. H. Miner, Assistant Secretary——

Q. Just tell us what he said, please.

A. He said, "Our retail stores also sell to consumers as well as to other retailers."

Mr. Tincher: May we have that marked, and make it Exhibit 24?

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 24, and same will be found among the exhibits in the cause.)

1289 Mr. Burch: Do you want that to go in?

Mr. Tincher: No, what she read here in this regard was simply to make as clearly as we could.

Mr. Burch: Is that compiled—? That is admitted I don't know what it is—the materiality is there, but anyway, we won't take up——

Mr. Tincher: It is simply in this regard which the defendant is claiming——

Mr. Ray: That is an exhibit, then?

Mr. Tincher: Yes, it is Exhibit number 24.

Mr. Mitchell: What? Exhibit number 24?

Mr. Tincher: Plaintiff Exhibit 24.

Q. And from Exhibit 24, this Mr. Miner, Assistant Secretary of the Goodyear Tire and Rubber Company, states:

"Our retail stores also sell to Consumers as well as to other retailers."

And you indicated that that testifies to you the confusion——

A. Yes.

Q. (Continuing) ——which you found in other literature?

A. Correct.

* * * * * * *

1291 **Cross-Examination,**

By Mr. Burch:

Q. Miss Ginsburg, in your background, you seem to be a lady that has a great sense of social responsibility, don't you?

A. Yes, sir.

Q. And you have always believed in the uplift and the betterment of the most numerous classes of society, haven't you?

A. That is right.

Q. Now, when this debate on the '49 amendment was before the Congress, the great antagonist for the—to the amendment was Senator Pepper. That was true, wasn't it?

A. One of them, yes, sir.

Q. Well, Senator Pepper was the most articulate and voluble against the amendment, wasn't he?

A. He talked against it, I believe, sir.

Q. You can pull, if you want, out and file with the Court the whole Congressional hearing, from which you quoted a very small part, but it does bear out my statement that Senator Pepper was one—or was the great—well, remained with the Solicitor or the Administrator and against the passage, isn't that right?

1292 A. He was by no means the only one. He was spokesman, but he was by no means the only one.

Q. That is what I want to ask. He was the spokesman, then?

A. That is right. But he was by no means the only one.

Q. And did you personally confer with Senator Pepper?

A. No, I never talked with Senator Pepper.

Q. You did not?

A. I never talked to Senator Pepper, never.

Q. Well, who was it from your office that was helping Senator Pepper at that time?

A. I don't know if anybody from my office was helping Senator Pepper.

Q. Ma'am?

A. It is possible, but I never talked to Senator Pepper.

Q. Now, why is it that in making the excerpts of the Congressional debates from Mr. Lucas, the sponsor of the bill you did not bring us any from Senator Taft, did not bring us the colloquy of Mr. Holland?

A. Well, what I brought you was the argument on the floor. It is—there was a great deal of discussion on the floor and everybody gave their points of view. It was not only between Holland and Pepper. Lots of
1293 people talked. And they all gave their different points of view, which varied considerably.

And what I was trying to bring out here was that they tried to clarify the questions and answers. In other words, Senator Pepper asked Mr. Holland a question, then Mr. Holland answered.

In addition to that, there are excerpts there from Senator Holland entirely, in which he felt the clarification was necessary, himself submitting a list of questions and answers to the question.

And we sort of felt that that was clarifying the record, which was complex.

Q. Well, now, why is it in bringing us this material to clarify it in the mind of the Court that you only brought the colloquy with Senator Pepper, who was opposed to the passage of the amendment, broadening the exemption, and whose view was defeated by the Congress, why didn't you bring us the views of the sponsor who sponsored the bill?

Why didn't you bring us the views of the majority who passed it?

A. Well, I thought that this was not specific. This

was an attempt by the spokesman for the bill, Sena-
1294 tor Holland, to explain what he meant. And that is what I brought there.

Q. And that the fact that Senator Pepper was making the point did not have anything to do with it?

A. I don't know—whoever would have asked him these questions, if he would have answered them this way.

Q. Would you agree with me this is fairly quoted from the Congressional Record? And I am going to read you—I will run along, I have got some extractions here.

Now, this is Senator Taft talking about Senator Pepper's position:

"On October eighteenth Senator Pepper submitted a statement expressing the views of a majority of the senate conferees as to the intention of the conference which prepared the conference reports on the Minimum Wage bill. It seems to me that this report was prepared in the first instance by the attorneys for the Wage-Hour Administration——"

Now, you weren't in on this?

A. No, sir. I am not an attorney.

Q. And you don't remember now who they were?

A. No, sir.

1295 Q. (Continuing reading) ——"in an effort on their part to retain jurisdiction in various field which the conference report clearly intended to take away from them. The Wage-Hour Administration for years has been trying to extend its jurisdiction beyond the field provided by Congress and is now trying to nullify the present Congressional action.

"The conference committee never considered this statement, or summary, nor was there ever any meeting of the Senate conferees to consider or discuss it. My own view is that the report and the act finally

adopted speaks for itself. I am quite certain that the conclusions of the report submitted by the senior Senator from Florida as to the intentions of the conferees are incorrect in many important particulars, and that the report of the House Managers is closer to their actual intentions.

"Since——"

Taft was the majority leader at that time, do you recall?

A. Yes, sir.

1296 Q. (Continuing reading): "Since other individual views have been submitted, however, I have prepared a partial discussion of some of the points at issue and submit it herewith.

"Considered in its entirety the summary submitted by the senior Senator from Florida does not state what the amendments are intended to accomplish. Its approach is a negative one of pointing out what the amendments are not intended to accomplish. This is especially true with respect to those amendments which were introduced to limit the coverage of the Act as interpreted by the Administrator and the courts. For example, the retail and service establishment exemption adopted by the overwhelming vote of the Senate was intended to prevent the Administrator and the courts from asserting coverage over those retail and service businesses on the main streets of America which were never intended to be covered when the original Act was written in 1938.

"Likewise the conferees agreed to a redefinition of the term 'produced' intending to prevent extension of coverage."

1297 And it refers to the Belo case.

Do you recall reading this?

A. Yes, sir, I think so.

Q. And do you remember in the Conference Report:

"Under the new test, if the sales are made within the State in which the establishment is located, it is immaterial that the sales (a) are made pursuant to prior orders from customers, (b) contemplate the purchase of goods by the establishment from outside the State to fill customers' orders or (c) are made to customers who are engaged in interstate commerce or in the production of goods for interstate commerce."

Now, I have got here about a twenty page excerpt that all bears upon the dates they changed the law as it existed before 1949, criticizing the efforts of the Administrator to extend his coverage and properly touching on the desire of Congress that in connection with the particular matters of retail exemption that the industry itself there should define what the practices were.

Do you recall reading all those in the extensive study from which we have got these excerpts from Senator Holland's speech you have given the Court?

1298 A. I don't recall reading anywhere that the industry itself was to be the final arbitrator of what was retail or wholesale in their industry. And what I quoted was the specific statement of Senator Holland to the effect that he did not think—and he being one of the sponsors and the spokesman—he himself is the sponsor, and what I quoted that the industry—he did not intend for the industry to decide for itself what was wholesale or retail.

Q. You don't recall the colloquy in which Senator Pepper has said exactly what you have said, that the industry could not be allowed to make its own set of rules, and Senator Taft came back and stated the majority rule on this very same question in which he says, "They are not making their rules. What their interpretation is as of this date is a matter of fact." You don't remember that?

A. Not exactly.

Q. I am reading from 95 Congressional Record 12502:

"Under the third test, any sale or service to a private consumer, businessman who does not purchase to resell, or farmer will have to be treated by the Administrator and courts as a retail sale or service, so long as such
1299 sale or service is recognized in the particular industry as a retail sale or service."

That is not the part I wanted to read.

Wait a minute. Here it is.

Mr. Ray: While you are looking, will you clarify this for me?

There are some materials where that conclusion he is making become part of the legislative history. In other words, here comes Senator Pepper with what his contentions are on the amendment—nothing more than an effort —been passed, anyhow. Then here comes Senator Taft along, Your Honor, to answer Senator Pepper's views there and makes a speech exactly contrary he is making to the other's. Is this part of the deal there, those two efforts or those concerning the statements—in commerce or not? Or what part——

Mr. Burch: Taft——

Mr. Ray: What part——

Q. 95 Congressional Record, 12956. Again, I ask you this:

"The 'recognized in the particular industry' test does not give industries the right to decide what is a
1300 retail sale for themselves. Hardly an industry can be found in which the question of what is retail and what is wholesale has not been settled for years. It is a question of fact just as much as any other question of fact."

A. Well, as I said before, there was a great deal said in that record, and we went through to try to determine,

and we thought that Senator Holland being the spokesman for it, so we finally handled—as questions and answers would have considerable meaning.

Q. Well, I believe we all agree that the law says—that finally passed—that what is retail is what is considered in the industry as retail?

A. But that question—but that was—the "recognized in the industry", that is what the Senator Holland was specifically answering when——

Q. I didn't ask you anything about Senator Holland, just asked you if you agree with me that it is what the law that came out of all this debate——

A. Oh, yes, it says "recognized in the industry," yes, sir.

Q. Now, you would admit that there is a very wide distinction recognized in many industries that there is a difference in what is retail and what is wholesale as it affects this industry, don't you?

1301 There is no standard, uniform test of wholesale or retail that is valid for all industries, is there?

A. Well, it might. For instance, some parts of marketing test definition holds for all industries, I think.

Q. You would think and contend, would you, that any sale of commodity that is not to be consumed and enjoyed by the purchaser, but is to be used by him in some further commercial transaction, according to your definition, in every industry would be a wholesale sale?

A. Not necessarily. I would not say that. Now, does the SIC definition say that?

Q. That is exactly what I was going to read. You realize that the Bureau of Census definition has been expressly repudiated in three cases, don't you?

A. No, I didn't know it. I don't know much about the law.

Q. But even in there now, and I am quoting correctly from it:

"Not all these characteristics need be shown. And some are motivated by trade practice. For the most part establishments engaged in retail trade sell merchandise to the general public for personal or household
1302 consumption. Certain exceptions to this general rule are made necessary by trade practices. Establishments engaged in selling to the general public from displayed merchandise products as typewriters, stationery, or gasoline—or gasoline are classified as retail trade, even though such product may not be used for personal or household consumption."

A. That is right. That is part of it.

Q. Now, Miss Ginsberg, as a person who had an important and authoritative and useful part in drafting the interpretative bulletin, I want you to tell me any individual or officer or official or employee or stockholder, even, in the tire industry who has written anything in the form of a letter to you personally even, or probably—or make a publication that sustained the classification of the Administrator?

A. I don't know anybody in the industry that has done that.

Q. So, although the law required the retail exemption to be accorded those establishments that in the industry were classified as retail, you cannot name me a single bit of information that has come to you from anybody
1303 in that industry that sustains the interpretative bulletin, can you?

A. The law does not say "by the industry".

Q. I said "in".

A. I take it the law says "in the industry" and——

Q. Let me re-define it to you.

A. (Continuing) And this is——

Q. Can you name me a single officer, director, stockholder, or employee engaged or occupied in the tire

industry who has written a statement you can produce to substantiate the interpretative bulletin with reference to commercial accounts?

A. Well, it depends on how you interpret "in the industry". I might use that lingo "in the industry"——

Q. Now, Miss Ginsberg, it is getting close to dinner. And I said "in the industry". I define it as this. You just go along with me. Don't ask you to say I am right. Just follow my question.

Name an officer, director, stockholder, or employee——

A. No, sir.

Q. You cannot name a one?

A. I can't name one.

Mr. Burch: That is all I can ask now, please.

That is all, Your Honor.

* * * * * * *

**PLAINTIFF'S EXHIBIT 7.**

| | | |
|---|---|---|
| 1) Sales for Resale | | 58,395.00 |
| 2) National Account Sales (General Tire & Rubber Co.) | | 115,597.00 |
| 3) Sales of new Truck Tires to fleets known to have had 10 or more vehicles in 1960 | 110,981.00 | |
| Less 10% Tubes | 11,098.00 | 99,883.00 |
| 4) Sales of new Truck and Passenger Tires to Governments | | 47,159.00 |
| 5) Sales to City of Memphis (New Truck & Passenger Tires) | | 9,289.00 |
| 6) Recapping to fleet accounts at less than Retail | | 24,951.00 |
| | | 353,373.00 |

**PLAINTIFF'S EXHIBIT 8.**

Re: Goldberg v. Steepleton et al.

Civil No. 4344,

U. S. District Court, Western Dist., Tenn.

Answers to interrogatories 3-11, inclusive, served on or about November 5, 1961 on defendant by plaintiff, from workpapers of C. P. A. prepared under the direction of defendants' attorney furnished to plaintiff's attorney per agreement between counsel.

**Interrogatory #3.** Percentage of gross income derived from customers outside the state of Tennessee.

**Answer:** No record of income from customers outside of Tennessee is maintained by defendant, other than records supporting monthly Tennessee sales tax reports filed by defendant. No credit was claimed by defendant on its Tennessee Franchise, Excise tax reports for 1959 or subsequent years since sales made outside of Tennessee are far too insignificant to warrant a branch office or make additional special records economical.

**Interrogatory #4.** Percentage of tires recapped for sale by defendant as contrasted to number of customers' tires recapped by defendant and returned to customer.

**Answer:** Defendant keeps no record of number of tires recapped; defendant recaps few, if any, tires for sale.

**Interrogatory #5.** "Non-retail" sales (during 1960) by quarters, and the percentage such "non-retail" sales bore to total sales.

**Answer:** The defendant maintains no records captioned "non-retail" sales, nor does defendant know of any use

of the term "non-retail" as a classification of sales in the tire industry. The only sales by defendant which are not retail sales are sales for resale. Defendant accepts the values of its sales for resale by quarters during 1960 shown in Col. 1 of Ex. 2 to the deposition of Micklish, the total of which is $45,112.00, as accurate to an acceptable degree. The names and addresses of customers to whom defendant made such sales for resale during 1960 may be obtained from defendant's sales invoices by plaintiff.

**Interrogatory #6.** Gross income from sales and services.

**Answer:** Defendant's gross income during 1960, by quarters, from sales and services to its customers was as follows:

| | |
|---|---|
| 1st quarter | $209,445.42 |
| 2nd quarter | 242,660.70 |
| 3rd quarter | 244,690.16 |
| 4th quarter | 206,724.28 |

**Interrogatory #7.** Sales and service income by customer.

**Answer:** This duplication or accumulation of defendant's sales invoices for 1960 may be made by plaintiff.

**Interrogatory #8.** Sales, including services and new and recapped tires, by defendant to national accounts by quarters during 1960.

**Answer:** Recapping service by defendant during 1960, by quarters, for companies which then had national account status grossed the following amounts:

| | |
|---|---|
| 1st quarter | $4,083.76 |
| 2nd quarter | 4,299.17 |
| 3rd quarter | 1,663.41 |
| 4th quarter | 2,771.08 |

*Plaintiff's Exhibit 8*

The defendant makes no sales to national account customers.

Replacement of inventory values plus commissions earned for deliveries of new tires by defendant to national account customers of General Tire and Rubber Company by quarters during 1960 were:

| | |
|---|---|
| 1st quarter | $28,306.16 |
| 2nd quarter | 43,809.70 |
| 3rd quarter | 29,490.25 |
| 4th quarter | 11,318.02 |

No deliveries of recapped tires were so made.

**Interrogatory #9.** Sales of new or recapped tires and services during 1960, by quarters, to city, county and state governments.

**Answer:** No sales of recapped tires were made by defendant to customers in these categories.

Sales of new tires and recapping services by defendant to customers in these categories during 1960, by quarters, grossed the following amounts:

| | |
|---|---|
| 1st quarter | $22,158.96 |
| 2nd quarter | 25,142.10 |
| 3rd quarter | 27,038.92 |
| 4th quarter | 26,093.04 |

In addition to the above the following sales were made to the City of Memphis, some or all of which were made pursuant to formal invitation to bid:

| | |
|---|---|
| 1st quarter | $ 93.75 |
| 2nd quarter | 95.65 |
| 3rd quarter | 786.74 |
| 4th quarter | 402.44 |

**Interrogatory #10.** Sales or other income received during 1960 from fleet accounts of ten vehicles or more:

**Answer:** Defendant's records do not and could not reasonably reflect the numbers of vehicles either owned or leased or operated by its customers. It would be impracticable and extremely poor customer relations, if not impossible, for defendant to ascertain, record or maintain records reflecting the number of vehicles operated by its customers at any given time or over any period of time.

**Interrogatory #11.** Sales and service income received from taxi companies by defendant during 1960.

**Answer:** Defendant had only two taxi companies as customers during 1960. As shown by Col. 7 on Ex. 2 to the deposition of Micklish, defendant's gross receipts from these two customers during 1960 constituted less than 1% of defendant's gross income. Defendant maintains no separate records on taxi companies and, while not accepting the values in Col. 7 on the said exhibit, agrees that such sales are inconsequential in volume as shown by same.

## PLAINTIFF'S EXHIBIT 13.

"Commercial Sales" Distinguished From
"Regular Retail."

In the October 1952 issue of **The Journal of Marketing**, published by the American Marketing Association, in an article entitled "The Quantity Limit Rule and the Rubber Tire Industry," Warren W. Leigh states that "all substantial tire dealers do three types of business." He describes each of these three types of business, and in doing so differentiates between "commercial sales" and "regular retail."

> "a. **Wholesale.** The larger the sales volume of a dealer, the larger is the wholesale portion of his business. A dealer in the volume brackets above $100,000

normally sells 20 to 50 percent of his volume at wholesale.[1]

"b. **Commercial** sales refer to sales to trucking companies and national accounts. Large dealers to a great extent depend on commercial business for their volume. In urban centers particularly, these dealers concentrate almost entirely on sales to other dealers or to truck accounts and are playing a lesser and lesser part in the over-the-counter sales of passenger tires.

"c. **Regular retail** embraces sales to individual consumers who usually own one or two vehicles" (pp. 147-148).

hands of factory-owned stores or dealers in the cities, who secured special discounts from manufacturers and passed them on to large buyers. Now the trend is reversed and the manufacturer is again taking over volume sales" (p. 100).

Warren W. Leigh, in his chapter on "Automotive Tires" in Marketing Channels for Manufactured Products, edited by Richard M. Clewett, points out that gasoline service stations, parts and accessory dealers, motor vehicle dealers, automotive repair shops, farm equipment dealers, department stores, chain stores and mail order houses have all gone into the retail tire distribution business. As a result of this, the tire dealer has gone heavily into selling to commercial accounts and to all these types of retail dealers. Thus he is no longer primarily in the retail business. But he is still being referred to as retail dealer. Mr. Leigh states:

"The character of tire dealers has altered as they adapted themselves to the new competition and to

[1] Such a dealer carries a large inventory of various types and sizes of trucks, passenger, and perhaps, farm equipment tires. He in turn travels one or more salesmen to sell sub-dealer accounts within the area. In addition, many small outlets such as garages, oil stations, etc., use him as a pick-up source of supply.

changing market demands. These dealers have become primarily semi-wholesalers, truck tire sellers, and recappers instead of passenger tire retailers. The dispersion of the tire market plus the fact that a little retailer or gasoline station needs to carry only five passenger tire sizes to top 87 percent of the passenger car market has encouraged the multiplication of tire outlets. Tire manufacturers have encouraged tire dealers by their discount programs, to carry tire stocks and sell and supply these small sub-dealers. On the other hand, the drift of passenger tire purchasing from downtown stores to outlying convenient locations has caused the large, more centrally located dealers to concentrate on the large-volume commercial account business, recapping and other tire services" (pp. 131-132).

Sales to Over-the-Counter Buyers Distinguished From Sales to the Commercial Market by Volume and Discounts.

Marketing Channels for Manufactured Products, edited by Richard M. Clewett, Ph. D. (Chairman, Department of Marketing, School of Commerce, Northwestern University), Richard D. Irwin, Inc., Homewood, Illinois, 1954; Chapter 5—Automotive Tires, by Warren W. Leigh (Dean of College of Business Administration, and Professor of Business Administration, University of Akron).

"The largest volume of sales is made to replace the worn out tires on cars and trucks. This constitutes the renewal or replacement market, which is really a dual market. The largest segment of replacement buyers are individual owners of automobiles and operators of from one to five trucks. These purchasers buy tires as their vehicles need them. Owners of from 5 to 1,000 trucks constitute the so-called commercial market.

These purchasers buy several to hundreds of tires at a time, and tire costs are a definite item to them. Not only the volume purchased but the discounts allowed and the services required set this group apart from over-the-counter buyers" (p. 122).

## PLAINTIFF'S EXHIBIT 17.

### Classification of Tire Dealers in the Standard Industrial Classification Manual.

The Standard Industrial Classification Manual[1] includes tire and tube dealers under major Group 50, Wholesale Trade; Group No. 501, Motor Vehicles and Automotive Equipment; Industry No. 5014, Tires and Tubes, which is defined as:

"Establishments primarily engaged in the wholesale distribution of rubber tires and tubes for passenger and commercial vehicles" (p. 147).

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1 U. S. Bureau of the Budget, Standard Industrial Classification Manual, 1957. The Standard Industrial Classification was developed for use in the classification of establishments by type of activity in which engaged; for purposes of facilitating the collection, tabulation, presentation, and analysis of date relating to establishments; and for promoting uniformity and comparability in the presentation of statistical data collected by various agencies of the United States Government, State agencies, trade associations, and private research organizations.

The Classification is intended to cover the entire field of economic activities: agriculture, forestry, and fisheries; mining; construction; manufacturing; transportation, communication, electric, gas, and sanitary services; wholesale and retail trade; finance, insurance, and real estate, services; and government.

The Classification was prepared by the Technical Committee on Standard Industrial Classification, assisted by a number of special committees of experts in various fields of business. The work of the Technical Committee was carried on under the sponsorship and general supervision of the Office of Statistical Standards of the Bureau of the Budget, Executive Office of the President.

In preparing the Classification, the Technical Committee was guided by the general principle that the classification should conform to the existing structure of American industry.

In preparing the classification, the Technical Committee received assistance from the Advisory Council on Federal Reports, an organization of businessmen who act as advisers to the Bureau of the Budget. The Advisory Council aided in the establishment of 26 committees of industry representatives to review specific sections of the Manual.

*Plaintiff's Exhibit 17*

No industry entitled tire and tube dealers is listed in the SIC Manual under Retail Trade. Dealers selling tires at retail are included in the category entitled Tire, Battery and Accessory Dealers.

Tire, Battery and Accessory Dealers are classified in Retail Trade under Major Group 55, Automotive Dealers and Gasoline Service Stations; Group No. 553 and Industry No. 5531, Tire, Battery and Accessory dealers, which are defined as:

> "Establishments primarily engaged in the retail sale of automotive tires, batteries, and other automobile parts and accessories. Such establishments frequently have facilities for tire recapping and vulcanizing . . ." (p. 160).

The SIC Manual defined Wholesale Trade and Retail Trade as follows:

**Wholesale Trade:**

"This division includes establishments or places of business primarily engaged in selling merchandise to retailers; to industrial, commercial, institutional, or professional users; or to other wholesalers; or acting as agents in buying merchandise for or selling merchandise to such persons or companies. The principal types of establishments included are: (1) merchant wholesalers—wholesalers who take title to the goods they sell such as wholesale merchants or jobbers, industrial distributors, voluntary group wholesalers, exporters, importers, cash-and-carry wholesalers, drop shippers, wagon distributors, retailer cooperative warehouses, terminal elevators, and cooperative buying associations; (2) sales branches and sales offices (but not retail stores) maintained by manufacturing or mining enterprises apart from their plants or mines

for the purpose of marketing their products; (3) agents, merchandise or commodity brokers, and commission merchants; (4) petroleum bulk stations; and (5) assemblers, buyers, and associations engaged in the cooperative marketing of farm products.

"The chief functions of establishments included in wholesale trade are selling goods to trading establishments, **or to industrial, commercial, institutional and professional users**; and bringing buyer and seller together. In addition to selling, functions frequently performed by wholesale establishments include maintaining inventories of goods; extending credit; physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery; refrigeration; and various types of promotion, such as advertising and label designing" (p. 147). (Emphasis not in original.)

**Retail Trade:**

"Retail Trade includes establishments engaged in selling merchandise for personal, household or farm consumption, and rendering services incidental to the sale of the goods. In general, retail establishments are classified by kind of business according to the principal lines of commodities sold (groceries, hardware, etc.), or the usual trade designation (drug store, cigar store, etc.). Some of the important characteristics of retail trade establishments are: the establishment is usually a place of business and is engaged in activities to attract the general public to buy; the establishment buys or receives merchandise as well as sells, the establishment may process its products, but such processing is incidental or subordinate to selling; the establishment is considered as retail in the trade; and the establishment sells to customers for personal, household, or farm use. Not all of these characteristics

need be present and some are modified by trade practice.

"Buying of goods for resale to the consumer is a characteristic of retail trade establishments that particularly distinguishes them from the agricultural and extractive industries. For example, farmers who sell only their own produce at or from the point of production are not classified as retailers.

"Processing incidental or subordinate to selling often is conducted at retail stores. For example, restaurants prepare meals and feed stores grind feed. Retail establishments of manufacturing concerns are included in retail trade.

"For the most part, establishments engaged in retail trade sell merchandise to the general public for personal or household consumption. Certain exceptions to this general rule are made necessary by trade practices. For example, retail lumber yards are included in Retail Trade despite the fact that a high proportion of their sales are made to contractors; and establishments selling feed, fertilizer, machinery, etc., to farmers are also included in Retail Trade. Chain store warehouses are considered auxiliary to the retail establishment served and are classified on the basis of the industrial activity carried on by such retail stores.

"Establishments engaged in selling to the general public, from displayed merchandise, products such as typewriters, stationery, or gasoline, are classified in retail trade even though such products may not be used for personal or household consumption. However, establishments that sell these products only to institutional or industrial users and establishments that sell similar merchandise for use exclusively by business establishments are not classified in Retail Trade" (p. 153).

## PLAINTIFF'S EXHIBIT 18.

Classification of Tire Dealers in the 1958 Census of Business.

**Wholesale Trade**[1]

"Wholesale trade, as defined in major group 50 of the 1957 edition of the SIC Manual, and as covered in the 1958 Census includes establishments primarily engaged in selling merchandise to retailers; to institutional, industrial, commercial and professional users; or to other wholesalers; or in negotiating as agents in buying merchandise for or selling merchandise to such persons or companies" (1958 Census of Business, Wholesale Trade, United States Summary, p. 1-103).

"Motor Vehicles, Automotive Equipment (SIC 501)—Establishments primarily engaged in the wholesale distribution of new and used passenger automobiles and other vehicles, automotive parts and accessories, equipment for filling stations and garages, and rubber tires and tubes for passenger and commercial vehicles" (Same, p. 1-103).

"Tires and tubes (SIC 5014)—Establishments primarily engaged in the wholesale distribution of rubber tires and tubes for passenger and commercial vehicles" (Same, p. 1-103).

**Retail Trade**[2]

"Retail trade, as defined in major groups 52 through 59 of the 1958 Census, includes establishments primarily engaged in selling merchandise to personal, household, and

1 U. S. Census of Business, 1958, Vol. III, Wholesale Trade, Summary Statistics.

2 U. S. Census of Business, 1958, Vol. I, Retail Trade Summary Statistics.

farm users" (1958 Census of Business, Retail Trade, United States Summary, p. 1-117).

"Automotive Dealers (SIC Major Group 55, Except 554—Gasoline Service Stations) **Note**: This group does not include establishments primarily engaged in selling trucks and motorized industrial equipment. Such establishments are included in the Wholesale Trade portion of the Census of Business" (Same, p. 1-119).

This section includes:

Passenger car dealers, franchised (SIC 551).
Passenger car dealers, non-franchised (SIC 552).
Tire, battery, accessory dealers (SIC 553).
Aircraft, boat, motorcycle dealers (Part of SIC 559).
Household trailer dealers (Part of SIC 559).
Other automotive dealers (Part of SIC 559).

"Tire, battery, accessory dealers (SIC 553)—Establishments primarily selling new automobile tires, batteries, automobile seat covers and automobile parts and accessories" (Same, p. 1-119).

**PLAINTIFF'S EXHIBIT 19.**

Federal Government Definitions of "Wholesale" and "Retail."

**Definitions of "Wholesale."**

"This division includes establishments or places of business primarily engaged in selling merchandise to retailers; to industrial, commercial, institutional or professional users; or to other wholesalers; or acting as agents in buying merchandise for or selling merchandise to such persons or companies. . . .

"The chief functions of establishments included in wholesale trade are selling goods to trading establishments, or

to industrial, commercial, institutional, and professional users; and bringing buyer and seller together. In addition to selling, functions frequently performed by wholesale establishments include maintaining inventories of goods; extending credit; physically assembling, sorting, and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery; refrigeration; and various types of promotion, such as advertising and label designing." (Executive Office of the President, U. S. Bureau of the Budget, Standard Industrial Classification Manual, 1957, p. 147.)

"Wholesale Trade as defined in the **Standard Industrial Classification Manual**, and as covered in the 1954 Census, includes establishments or places of business primarily engaged in selling merchandise directly to retailers; to industrial, commercial, institutional or professional users; or to other wholesalers; or acting as agents in buying merchandise for, or selling merchandise to, such persons or companies." (U. S. Census of Business, 1954, Vol. IV, Wholesale Trade—Area Statistics, p. 1.)

"**Sale at wholesale and wholesaler.** Sale at wholesale means a sale by a person who buys a commodity and resells it, without substantially changing its form, or who supplies a service, to an industrial or commercial user, or to any person other than the ultimate consumer. A seller who in the regular course of business makes sales at wholesale is a wholesaler." (U. S. Economic Stabilization Agency, General Ceiling Price Regulations, Approved: January 26, 1951, p. 8.)

" 'Sale at wholesale' means a sale by a person who receives delivery of a commodity and resells it, without substantially changing its form, to any person other than the ultimate consumer." (U. S. Office of Price Administration,

the General Maximum Price Regulation, Bulletin No. 1, April 28, 1942, p. 12.)

"For the purpose of this Code, a 'wholesaler' or 'distributor' shall be defined as any individual, partnership, association, corporation, or other firm, or a definitely organized division thereof, definitely organized to render and rendering a general distribution service, which buys and maintains at his or its place of business a stock of the lines of merchandise which it distributes; and which through salesmen, advertising, and/or sales-promotion devices, sells to retailers and/or institutional, commercial, and/or industrial users; but which does not sell in significant amounts to ultimate consumers.

"**Ultimate Consumer.** The term 'ultimate consumer' as used herein is defined as a purchaser for home and personal use, and not for use or consumption in trade or business or by institutions." (National Recovery Administration, Codes of Fair Competition as Approved, Approved Code No. 201, Code of Fair Competition for the Wholesaling or Distributing Trade, as approved on January 12, 1934, p. 72.)

**Definitions of "Retail."**

"Retail Trade includes establishments engaged in selling merchandise for personal, household, or farm consumption, and rendering services incidental to the sale of the goods. . . . Some of the important characteristics of retail trade establishments are: the establishment is usually a place of business and is engaged in activities to attract the general public to buy; the establishment buys or receives merchandise as well as sells; the establishment may process its products, but such processing is incidental or subordinate to selling; the establishment is considered as retail in the trade; and the establishment sells to customers for per-

sonal, household, or farm use. Not all of these characteristics need be present and some are modified by trade practice.

* * *

"For the most part, establishments engaged in retail trade sell merchandise to the general public for personal or household consumption. Certain exceptions to this general rule are made necessary by trade practices. For example, retail lumber yards are included in Retail Trade despite the fact that a high proportion of their sales are made to contractors; and establishments selling feed, fertilizer, machinery, etc., to farmers are also included in Retail Trade. Chain store warehouses are considered auxiliary to the retail establishment served and are classified on the basis of the industrial activity carried on by such retail stores.

"Establishments engaged in selling to the general public, from displayed merchandise, products such as typewriters, stationery, or gasoline, are classified in retail trade even though such products may not be used for personal or household consumption. However, establishments that sell these products only to institutional or industrial users and establishments that sell similar merchandise for use exclusively by business establishments are not classified in Retail Trade." (Executive Office of the President, U. S. Bureau of the Budget, Standard Industrial Classification Manual, 1957, p. 153.)

"Retail Trade, as defined in the **Standard Industrial Classification Manual**, and as covered in the 1954 Census of Business, includes establishments primarily engaged in selling merchandise directly to personal, household and farm users." (U. S. Census of Business, 1954, Vol. II, Retail Trade—Area Statistics, p. 1.)

*Plaintiff's Exhibit 19*

"**Sale at retail and retailer.** Sale at retail means a sale to an ultimate consumer other than an industrial or commercial user. A seller who in the regular course of business makes sales at retail is a retailer." (U. S. Economic Stabilization Agency, General Ceiling Price Regulation, Approved: January 26, 1951, p. 8.)

" 'Sale at retail' or 'selling at retail' means a sale or selling to an ultimate consumer other than an industrial or commercial user, except that for the purposes of section 4 of this Regulation,[1] a 'sale at retail' shall not include any sale by a producer, manufacturer, or fabricator of any commodity produced, manufactured, or fabricated by him." (U. S. Office of Price Administration, The General Maximum Price Regulation, Bulletin No. 1, April 28, 1942, p. 12.)

"Retail Trade—The term 'retail trade' as used herein shall mean all selling of merchandise to the consumer and not for purposes of resale in any form in the continental United States excluding the Panama Canal Zone. . . .

"Retailer—The term 'retailer' as used herein shall mean any individual or organization engaged wholly or partially in the retail trade." (U. S. National Recovery Administration, Code of Fair Competition for the Retail Trade, Approved Code No. 60, as Approved on October 21, 1933, p. 30.)

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1 "Section 4, Supplemental Regulations.": "If the maximum prices established for any commodity under the provisions of this Regulation fail equitably to distribute returns from the sale at retail of such commodity among producers, mnaufacturers, wholesalers, and retailers, the Price Administrator will by supplementary regulation establish such maximum prices for different classes of sellers, or fix base periods for the determination of their maximum prices, as will insure that each such class of resellers shall receive a fair share of such return. (Same, p. 4.)

*Plaintiff's Exhibit 19*

Concepts of Wholesale and Retail in Marketing Literature.

(The following definitions of "wholesaling" and "retailing" were taken from the writings of various authorities in marketing literature)

**Concepts of Wholesaling.**

"Theoretical Approach. . . . Wholesaling . . . includes all marketing transactions in which the purchaser is actuated solely by a profit or business motive in making the purchase, whether the goods are purchased for resale in the same form or for use in the business or industrial process. . . .

"Practical Modification. . . . Wholesaling . . . includes all transactions in which the purchaser is actuated solely by a profit or business motive in making the purchase, except for transactions that involve a small quantity of goods purchased in a retail store for business use, which transactions are considered as retail." (Beckman, Theodore N., Harold H. Maynard and William R. Davidson, Principles of Marketing, 6th Edition, New York, the Ronald Press Company, 1957, p. 265.)

"For the most part, wholesale merchants buy goods outright from manufacturers and suppliers and resell them to retailers or other outlets, usually granting credit and extending delivery service. Such firms may carry a broad line of merchandise or a relatively specialized and narrow line." (The Encyclopedia Americana, Volume 18, Washington, D. C., Americana Corporation, 1957 edition, p. 299e.)

"Wholesale middleman. A middleman is any dealer who assists in the distribution of goods from producer to ulti-

mate consumer. Thus the retailer is a middleman. A **wholesale middleman,** however, assists in the distribution of goods from producers to retailers; he does not sell to the ultimate consumer. The wholesale middlemen from whom retailers buy may be either wholesalers or agent middlemen.

"**Wholesalers** are dealers who buy from producers or other wholesale dealers and sell to retailers or to institutional or commercial users. . . . Wholesalers that sell primarily to retailers are sometimes called **wholesale merchants.**" (Wingate, John W. [Professor of Business Administration in Charge of the Retailing Program, CCNY], and J. Dana Weiner [Coordinator of Distributive Education, Northeast High School, Philadelphia; Training Director, Best Markets, Philadelphia], Retail Merchandising, 5th Edition, New York, South-Western Publishing Company, 1957, p. 223.)

"A **wholesale sale** is one made by, or through the agency of, a business establishment whereby goods are transferred to (1) a retailer, (2) any other middleman, (3) an industrial, professional, or business user (including service enterprises), or (4) an institutional user such as hospital, school, or governmental body. The size of a sale has no bearing on whether or not it is a 'wholesale sale.' Definitely excluded from this concept of 'wholesale sale' are all sales to ultimate consumers, even when made by wholesalers.

"A **wholesaling middleman** (or 'wholesaler,' or 'wholesale distributor') is a business whose **major** activity is making wholesale sales, either on their own behalf or in an agency relationship." (Shultz, William J. [presently professor of Business Administration, Supervisor of the Marketing Division, Bernard M. Baruch School of Business and Public Administration, CCNY; Marketing Consultant],

Outline of Marketing, Iowa, Littlefield, Adams and Company, 1956, p. 61.)

"Individuals or business firms engage in wholesaling when primarily they sell to, or negotiate sales with, those who buy for purposes of (1) resale or (2) industrial use." (Phillips, Charles F. [President, Bates College], and Delbert J. Duncan [Dean, School of Business, University of Colorado], Marketing: Principles and Methods, 3rd Edition, Illinois, Richard D. Irwin, Incorporated, 1956, p. 271.)

"Wholesaler. A merchant middleman who sells to retailers and/or to industrial, institutional, and commercial users but who does not sell in significant amounts to ultimate consumers.

"In the basic materials, semi-finished goods, and tool and machinery trades merchants of this type are commonly known as 'dealers,' 'distributors' or 'supply houses.' ('Distributor' is a term especially common in the appliance and automotive industries.)

"**Comment.** Generally these merchants render a wide variety of services to their customers. Those who render all the services normally expended in the wholesale trade are known as **Service Wholesalers**; those which (sic) render only a few of the wholesale services are known as **Limited Function Wholesalers.** . . .

"This definition ignores or minimizes two bases upon which the term is often defined; first, the size of the lots in which wholesalers deal, and, second, the fact that they habitually sell for resale. The figures show that many wholesalers operate on a very small scale and in small lots. Most of them make a significant portion of their sales to industrial users." (Hepner, Harry Walker, Modern Marketing Dynamics and Management, New York, McGraw-Hill Book Company, Incorporated, 1955, p. 218.)

*Plaintiff's Exhibit 19*

"The terms **wholesaler** and **jobber** are, for the most part, now used interchangeably. Originally, the jobber was a dealer in odd lots of merchandise; but this usage of the word has almost disappeared. A wholesaler, or jobber, is a merchant middleman who sells to other middlemen—namely, retailers—or to industrial and commercial users, but who does not sell to ultimate consumers." (Richert, G. Henry, Retailing: Principles and Practices, New York, McGraw-Hill Book Company, 1954, p. 51.)

"Wholesaling is the buying or receiving of goods in wholesale lots from producers or other wholesalers and their sales to retailers, producers, or other wholesalers. The producer from whom goods are bought may be a manufacturer or an agricultural producer, while the producer to whom goods are sold may include, along with both of these, the institutional buyer, who uses the goods to provide a service. Thus wholesaling may be carried on by producers, by merchants, by agents and brokers, and by producers and consumers acting through cooperative associations." (Duddy, Edward A. [Professor Emeritus of Marketing, the School of Business, the University of Chicago], and David A. Revzan [Associate Professor of Business Administration, School of Business Administration, University of California], Marketing: An Institutional Approach, 2nd Edition, New York, McGraw-Hill Book Company, 1953, p. 242.)

"The term **wholesaling** is used to cover the operations of middlemen and producers in getting processed goods from their point of production to the retailers or processors, and in getting the raw materials from farms, mines, fisheries, and forests to processors." (Converse, Paul D., H. W. Huegy, R. V. Mitchell [Professors of Marketing, University of Illinois], Elements of Marketing, 5th Edition, New York, Prentice-Hall, Incorporated, 1952, p. 304.)

*Plaintiff's Exhibit 19*

"**Wholesaler**—A merchant middleman who sells to retailers and to other merchants or to industrial, institutional, and commercial users or to all these classifications, but who does not sell in significant amounts to ultimate consumers. In the basic materials, semi-finished goods, and tool and machinery trades, merchants of this type are commonly known as dealers, distributors, or supply houses.

* * *

"This definition ignores or minimizes two bases upon which the term is often defined: first the size of the lots in which wholesalers deal, and, second, the fact that they habitually sell for resale. Figures show that many wholesalers operate on a very small scale and in small lots. Most of them make a significant portion of their sales to industrial users." (Graham, Irvin, Encyclopedia of Advertising, New York, Fairchild Publications, Incorporated, 1952, pp. 564, 565.)

"Wholesaler: middleman who sells, usually in relatively large quantities, to retailers or (as **supply houses**) to industrial users." (International Chamber of Commerce, Dictionary of Marketing Terms, Prepared by Richard Webster, Printed in Switzerland, Schuler S. A., Bienne, 1952, p. 97.)

"Wholesaling includes all sales by producers, by merchant and functional wholesalers or industrial supply houses, or by retailers to industrial, commercial or institutional buyers either for resale or for other use in the conduct of their enterprises." (Marketing Handbook, Edited by Paul H. Nystrom, New York, the Ronald Press Company, 1951, p. 10.)

"Wholesale business consists primarily in selling to retailers, dealers, or distributors (who buy the goods for resale and not for their own consumption) or selling to in-

stitutional or industrial users, such as hotels, ships or railways, who purchase for business use rather than for the purpose of reselling goods in the same form in contrast to retailers who typically sell to the consumers." (Margaret Hall, Distributive Trading: an Economic Analysis, London, Hutchinson's University Library, 1949, p. 79.)

"Wholesaler—A merchant middleman who sells to retailers and other merchants and/or to industrial, institutional, and commercial users but who does not sell in significant amounts to ultimate consumers." (American Marketing Association Defines Marketing Terms, Printers' Ink, January 14, 1949, p. 76.)

**Concepts of Retailing.**

". . . **a retail sale is one in which the buyer is an ultimate consumer,** as opposed to a business or institutional purchaser, **and the motive is personal** or family satisfaction stemming from the final **consumption of the article being purchased,** in contrast with purchases for resale or for business, industrial, or institutional use. . . .

"It is the composite of the transactions made by an establishment that gives it its principal character. **A retail establishment** may, therefore, **be defined as a single or separate place of business, principally engaged in the performance of marketing functions, wherein or out of which sales are made primarily to ultimate consumers.** . . .

"Most retail establishments are **retail stores.** These are places **of business which are open to and frequented by the general public, and in which sales are made primarily to ultimate consumers, usually in small quantities, from merchandise inventories warehoused and displayed on the premises.** . . .

*Plaintiff's Exhibit 19*

"Retailers are merchant middlemen who are engaged primarily in selling to ultimate consumers. . . .

"From the foregoing discussion it is evident that different conceptions underlie the proper use of the terms **retailing, retail establishment, retail store** and **retailer.** Retailing, in the broadest conception, **is the activity of selling to ultimate consumers for personal or household consumption.**" (Emphasis italicized in original.) (Beckman, Theodore N., Harold H. Maynard, and William R. Davidson, Principles of Marketing, 6th Edition, New York, the Ronald Press Company, 1957, pp. 126, 127.)

"Retailing is the distribution of goods and services to final or household consumers." (Kelley, Pearch C., and Norris B. Brisco, Retailing: Basic Principles, New Jersey, Prentice-Hall, Incorporated, 1957, p. 1.)

"Retailing may be defined as the activities incident to selling goods and services to **ultimate consumers.** Retailing is the final link in the chain of distribution of most products from initial producers to ultimate consumers. (Shultz, William J. [presently Professor of Business Administration, Supervisor of the Marketing Division, Bernard M. Baruch School of Business and Public Administration, CCNY; Marketing Consultant], Outline of Marketing, Iowa, Littlefield, Adams and Company, 1956, p. 36.)

"By definition a retail store is one that sells to the ultimate consumer. Thus any person or organization dedicated to this purpose is a member of the retail group." (Bunting, James Whitney [President, Oglethorpe University, Georgia], Essentials of Retail Selling, New York, Bookman Associates, 1954, p. 13.)

"Retailing . . . is the activity of selling at retail or making retail sales.

*Plaintiff's Exhibit 19*

". . . **a retail sale is one in which the buyer is an ultimate consumer,** as opposed to a business purchaser, **and the motive is personal or family satisfaction stemming from the final consumption of the article being purchased,** in contrast with buying for the motive of profit in transactions involving purchase for business or industrial use or for resale." (Emphasized italicized in original.) (Brown, Paul L. and W. R. Davidson, Retailing: Principles and Practices, New York, the Ronald Press Company, 1953, pp. 3, 4.)

"From the point of view of those who operate retailing agencies, retailing is that part of the marketing process that is concerned with making goods and services available to ultimate consumers. From the point of view of those who patronize retailers, retail buying is the purchase of goods and services by persons who will use them to satisfy their own wants and desires. The various types of retailers thus stand between the manufacturers and wholesale middleman on the one hand, and the ultimate consumer on the other, in which position they perform various services for each." (Duddy, Edward Augustin [Professor Emeritus of Marketing, the School of Business, The University of Chicago], and D. A. Revzan [Associate Professor of Business Administration, School of Business Administration, University of California], Marketing: an Institutional Approach, 2nd Edition, New York, McGraw-Hill Book Company, 1953, p. 146.)

"The retailer, who may be defined as a middleman who sells mainly to the ultimate consumer, is a specialist who maintains contact between consumer and producer." (Converse, Paul D., H. W. Huegy, and R. V. Mitchell [Professors of Marketing, University of Illinois], Elements of Marketing, 5th Edition, New York, Prentice-Hall, Incorporated, 1952, p. 347.)

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"Retailing—The activities incident to selling to the ultimate consumer. The goods may be produced, bought or carried in stock by the seller. This definition includes all forms of selling to the ultimate consumer. It embraces the direct-to-consumer sales activities of the producer whether through his own stores, by house-to-house canvass, or by mail order. It does not cover the sales by producers of industrial goods, by industrial supply houses, or by retailers to industrial, commercial or institutional buyers for use in the conduct of their enterprises." (Encyclopedia of Advertising, Graham, Irvin, New York, Fairchild Publications, Incorporated, 1952, p. 443.)

"Retailing: the sale to the ultimate (individual or household) consumer, usually in relatively small quantities; distinguished from **wholesaling—relatively large quantities to** those who resell (the **retailers).**" (International Chamber of Commerce, Dictionary of Marketing Terms, Prepared by Richard Webster, Printed in Switzerland, Schuler S. A., Bienne, 1952, p. 77.)

". . . retail trade includes all sales of goods for personal and household consumption." (Vaile, Roland S., E. T. Grether, and Reavis Cox, Marketing in the American Economy, New York, the Ronald Press Company, 1952, p. 173.)

". . . Retailing is defined by the Committee on Definitions [of the American Marketing Association] as 'the process of selling to the ultimate consumer. The goods sold may be produced, bought or handled by the seller.' It includes all forms of selling to the ultimate consumer, embracing along with the activities of the orthodox retail store the direct-to-consumer sales activities of the producer, whether through his own retail stores, by house-to-house canvass or by mail order." (Marketing Handbook, Edited

by Paul H. Nystrom, New York, the Ronald Press Company, 1951, p. 10.)

"Retailing is that part of the distributive process which is concerned with selling goods directly to the ultimate consumer." (Collins, George R., "Retailing," Encyclopedia Britannica, Vol. 19, 1949 edition, p. 231.)

"Retailing . . . has come to mean the conduct of a place of business where goods are sold to the ultimate consumer." (Hall, Margaret, Distributive Trading: an Economic Analysis, London, Hutchinson's University Library, 1949, p. 79.)

The retailer is "that middleman who stands nearest the ultimate consumer and serves as his 'purchasing agent.'" And, retail institutions are ". . . those marketing institutions engaged primarily in selling consumers' goods to ultimate consumers." (Phillips, Charles F., and Delbert J. Duncan, Marketing: Principles and Methods, Chicago, Richard D. Irwin, Incorporated, 1948, p. 141.)

"Retailer—A merchant or business establishment that sells mainly to the ultimate consumer.

"Comment. The retailer is to be distinguished by the conditions surrounding the sale rather than the procurement of the goods in which he deals. Attempts to define the retailer on the basis of the size of the units in which he sells prove indefensible. The size of his sales unit is an incidental rather than a primary element in his character. His essential distinguishing mark is the fact that his typical sale is made to the ultimate consumer.

"Retailing—the activities incident to selling to the ultimate consumer. The goods sold may be produced, bought or carried in stock by the seller.

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"Comment. This definition includes all forms of selling to the ultimate consumer. It embraces the direct-to-consumer sales activities of the producer whether through his own stores, by house-to-house canvass, or by mail order. It does not cover the sale by producers of industrial goods, by industrial supply houses, or by retailers to industrial, commercial, or institutional buyers for use in the conduct of their enterprises." (American Marketing Association Defines Marketing Terms, Printers' Ink, January 14, 1949, p. 76.)

"Ultimate Consumer—One who buys and/or uses goods or services to satisfy personal or household wants rather than for resale or use in business, institutional, or industrial operations.

"Comment. There seems to be a growing tendency to drop the word 'ultimate' from this term. The Committee recommends that this tendency be encouraged.

"The definition distinguishes sharply between industrial users and ultimate consumers. A firm buying and using an adding machine, a drum of lubricating oil, or a carload of steel billets is an industrial user of those products, not an Ultimate Consumer of them; under the developing usage it is not even a 'consumer' of them. A vital difference exists between the purposes motivating the two types of purchases which in turn results in highly significant differences in buying methods, marketing organization, and selling practices." (American Marketing Association Defines Marketing Terms, Printers' Ink, January 14, 1949, pp. 74, 76.)

"Retailing is that phase of general commerce devoted to the distribution and sale of goods to ultimate consumers.

It includes the sale not only of merchandise but also of services incidental or necessary to the use of such goods. . . . The distinguishing feature of the retail trade is that its business consists in selling merchandise to ultimate consumers." (Nystrom, Paul, "Retail Trade," Encyclopedia of Social Sciences, Vol. 13, p. 346.)

**PLAINTIFF'S EXHIBIT 20.**

National Recovery Administration Definitions.

**Approved Code No. 174—Code of Fair Competition for the Rubber Tire Manufacturing Industry, as Approved on December 21, 1933, by President Roosevelt:**

"Section 1. The term **'Rubber Tire Manufacturing Industry'** or **'Industry,'** as used herein, shall mean the manufacture for sale in the continental United States (including Alaska) and sale at wholesale by manufacturers or subsidiaries or affiliates of the same of solid or pneumatic rubber tires and/or pneumatic rubber tubes, together with such related branches or divisions as may from time to time be included under the provisions of this Code by the President, after such notice and hearing as he may prescribe.

"Section 2. The term **'member of the industry'** or **'member'** as used herein includes, but without limitation, any individual, partnership, association, corporation, or other form of enterprise engaged in the manufacture or both manufacture and sale at wholesale of any products of the industry, or any sibsidiary or affiliate of the same engaged in the sale at wholesale of any products of the industry" (p. 340).

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*Plaintiff's Exhibit 20*

"Section 6. The term **'dealer'** as used herein, shall mean anyone, whether or not a member, who has a financial interest therein, who purchases a member's brand of tires and/or tubes, from a member or jobber under contract for sale, either absolute, conditional, or on consignment, and who in turn resells to other than employees or affiliated companies, at least 75 percent of the tires or tubes so purchased. Company retail stores, whether wholly or partly owned, shall be classified as dealers" (p. 340).

"Section 7. The term **'jobber'** as used herein, shall mean anyone who sells at least 75 percent of his total volume of tires and/or tubes through or to dealers for resale to consumers, whether or not such dealers are owned or affiliated with or controlled by such jobber, and who performs the services of a jobber such as maintaining a stock, selling, shipping, billing and carrying accounts receivable" (p. 341).

**Approved Code No. 410—Code of Fair Competition for the Retail Rubber Tire and Battery Trade as Approved May 1, 1934, by President Roosevelt:**

"Section 1. The term 'Retail Rubber Tire and Battery Trade' or 'Trade,' as used herein, shall mean the sale or offering for sale to the ultimate consumer and not for resale purposes of:

"a. Solid or pneumatic rubber tires and pneumatic rubber tubes.

"b. Automotive storage batteries for starting, lighting, and/or ignition service and radio receiving storage batteries.

"c. Tire or battery parts and accessories.

"d. Automobile rims and wheels in connection with change-over from one type of tire equipment to another.

"e. The servicing of products of the trade" (p. 512).

**PLAINTIFF'S EXHIBIT 21.**

The Holland Amendment.

**Price and quantity test.**

Senator Holland, the sponsor of the amendment to 13 (a) (2), that "a 'retail or service establishment' shall mean an establishment 75% of whose annual dollar volume of sales of goods and services (or of both) is not for resale and is recognized as retail sales or services in the particular industry"—stated that his amendment did not overrule the price and quantity tests for distinguishing between retail and wholesale sales. He stated that the intent of his amendment was that sales involving quantities of goods materially in excess of that which the general consuming public regularly purchases should not be considered as retail sales, if such sales involved a special discount from the normal retail price. Senator Holland expressed himself to this effect repeatedly, as the following statements on the floor of the Senate, on Tuesday, August 30, 1949, shows:

"Mr. Pepper. It is not a fact that under the amendment offered by my distinguished colleague and his associates a so-called retail establishment could sell to purchasers in any quantity whatever without losing its retail character?

"Mr. Holland. No. If sales were made in sufficient quantity so there would be a discount and they would be regarded not as retail sales, but as wholesale sales,

they would lose their exemption. That is perfectly clear from the amendment, and it is perfectly clear from all the discussion of the subject before the committee and on the floor of the Senate" (95 Cong. Record, p. 12497).

"Mr. Holland: Mr. President, I find it impossible to distinguish between sales in small volume—which are recognized in an industry as retail—sales to a local hotel or local laundry or to a local business building or city hall or courthouse or any other business place, when the sale is a part of the normal, everyday retail business, assuming that the sale is not made in such quantity that discounts are allowed. Of course, if it is, it comes in the category of wholesale sales" (95 Cong. Record, p. 12501).

"Mr. Holland: A wholesale transaction would be one in such quantities as to be beyond the industry's standard for retail sales and when the purchases are made in such quantities as to entitle the purchaser to discounts such as are allowed in wholesale transactions. I think the same standard would apply to any type of commodity sold" (95 Cong. Record, p. 12501).

Senator Holland also reiterated this interpretation in a list of questions and answers which he submitted:

"Question: Do quantity and price involved in a sale play any part in the proposed amendment in determining the applicability of the exemption?

Answer: Yes. Under paragraph (2) of the proposed amendment a sale is not retail unless regarded in the particular industry as such. As a general rule, sales in quantities substantially larger than those to the average buyer and at a substantial discount are regarded as wholesale and not as retail.

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*Plaintiff's Exhibit 21*

Question: What tolerance or allowance for wholesale or nonretail selling or servicing is provided for in the proposed amendment?

Answer: Twenty-five percent. The same as the Administrator allows under the present law. See the Administrators 1948 Annual Report to Congress, page 119. Under paragraph (2) of the proposed amendment the 25 percent tolerance would be for transactions not recognized in the particular industry as retail selling or servicing such as sales for resale and quantity, sales at a discount" (95 Cong. Record, p. 12505).

**Recognized as retail sales or services in the particular industry.**

Senator Holland stated that it was not the intent of the phrase and is recognized as retail or service in the particular industry to delegate full authority to a trade association or any other interested group in an industry to decide for itself what was a retail sale in that particular industry. The definition given by a trade association would merely be one criterion in the determination. Other generally accepted criteria would also be taken into consideration. The "well-settled habits of business would be considered." In the final analysis it would be up to the Administrator to define retail sales. If the administrative rulings and interpretations were not regarded as sound by individuals concerned they could appeal for a ruling by the courts.

The following statements made on the floor of the Senate when the amendment was being considered (August 30, 1949) show this:

"Mr. Douglas. I should also like to ask the Senator from Florida the meaning of the phrase:

*Plaintiff's Exhibit 21*

'And is recognized as retail sales or service in the particular industry.'

Who is to define that?

"Mr. Holland. Who but the Administrator? If the administrative or interpretative ruling is not regarded as sound by the individual person concerned, then he can appeal; and then the matter will be ruled on by the courts.

"Mr. Douglas. I understand that the interpretation which would be made would be that given to a 'retail sale' by a trade association.

"Mr. Holland. That is one criterion, of course; but I do not believe thet Senator from Illinois, and certainly not the Senator from Florida, would wish to delegate full authority in the matter to a trade association or any other interested group" (95 Cong. Record, p. 12501).

"Mr. Aiken. Does not that [the phrase 'and is recognized as retail sales or services in the particular industry'] throw the situation wide open for each industry to determine whether its sales shall be considered retail or wholesale?

"Mr. Holland. It is not the judgment of the sponsors of the amendment that that would be the result. On the contrary, it is our belief that the Administrator would have a function to perform, and if he goes astray, in the judgment of individuals who are affected he could be appealed from, the case could be taken to court" (95 Cong. Record, p. 12510).

"Mr. Aiken. Then we have the Senator's assurance that this wording is clearly not intended to permit any industry to determine for itself what are generally recognized as retail sales?

*Plaintiff's Exhibit 22*

"Mr. Holland. No, . . . There would be various criteria which could be applied, one of which, of course, would be the conclusion of the trade association in the particular industry. But that is only one criterion. Others would apply. The well-settled habits of business must be applied. They will not necessarily be the same in all trades of businesses" (95 Cong. Record, p. 12510).

**PLAINTIFF'S EXHIBIT 22.**

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Mr. Pepper. Is it not a fact that under the amendment offered by my distinguished colleague and his associates a so-called retail establishment could sell to purchasers in any quantity whatever without losing its retail character?

Mr. Holland. No. If sales were made in sufficient quantity so there would be a discount and they would be regarded not as retail sales, but as wholesale sales, they would lose their exemption. That is perfectly clear from the amendment, and it is perfectly clear from all the discussion of the subject before the committee and on the floor of the Senate. There are many people in business, as, for instance, automobile dealers, who, in the very nature of things do not sell small articles, but sell by the unit, and who would sell a truck to an individual purchaser just as they would sell one to any business enterprise, one at a time, at the same price. Yet under the rulings of the Administrator, as upheld by one of the courts, those who are selling trucks are not making a sale which can be regarded as retail, because the truck is to be used in business. Therefore, under the test and standard imposed, such a sale can never be regarded as a retail sale. In other words, the distinction is made that the same salesman selling a Cadillac car to a person for his use by himself and his family is

regarded as having made a retail sale, whereas in selling a Ford truck to someone who is going to use the truck for business purposes, as trucks have to be used, he is regarded as not having made a retail sale. The unfortunate businessman who is in the truck business solely, or a large part of whose sales are sales of trucks, is deprived of the exemption, and is in a terrible fix, whereas his neighbor across the street, who may be selling a much more expensive article, is exempted because his article is sold in the form of passenger cars to family users thereof.

Mr. Pepper. Mr. President, will my colleague yield?

Mr. Holland. I yield.

Mr. Pepper. I again call attention to the fact that I do not so understand the regulations of the Wage-Hour Administrator. It is my understanding that if the article purchased by the business user is the kind of an article generally that is bought in only such quantity as an ordinary consumer would require, the sale would not be regarded as other than a retail sale. For example, take the truck case my colleague cited. I have talked to the representative of the Wage-Hour Division a good many times about this matter, and it is my understanding that if the sale to a business user of a truck is of the same general kind of truck that a farmer or an individual user would buy, for example, a pick-up truck, the fact that the business purchaser happened to buy the truck makes no difference, but if it is a 5-ton truck, or a 10-ton truck, the kind of truck which no individual user for consumption purposes would ordinarily acquire, but is adopted only for the kind of business use for which a truck is ordinarily used, that would not be accounted as a retail sale, but would be accounted as a nonretail sale. If an automobile dealer sold a Cadillac passenger car to a business user it would be considered a retail sale, but if he sold a fleet of Cadillac cars to one who

was operating a taxicab company, or a commercial venture, that would not be regarded as a retail sale.

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Mr. Holland. Mr. President, in reply to my distinguished colleague, I will say that in the ruling of the court in the case of McComb against Deibert, in the eastern district of Pennsylvania, and now, as I understand, on appeal before the United States Court of Appeals for the Third Circuit, the court departed entirely from the principle announced by my colleague and I shall, if I may, read from that decision a couple of paragraphs.

While that case turned on only one type of retailer, namely, an automobile dealer, it exemplifies graphically the error of the position taken by the courts and the Administrator. I call the attention of my colleague to the fact that in that case the court in effect held that no sale of a truck can be retail because a truck is always sold for business purposes rather than for personal, family, or household use. Even though the court denied the exemption, it found—and I quote from the decision of the learned judge:

"It is a well-recognized concept in the automotive-trade industry that sales of trucks in nonfleet quantities to persons for business or commercial use and not for resale purposes have always been regarded as retail; sales of trucks for resale or in fleet quantities are not considered retail.

"The industry has never drawn any distinction between the sale of passenger cars and the sale of trucks with respect to the question of whether the transaction is retail or not. In both cases the transaction is regarded as retail so long as the sale is to the ultimate purchaser in nonfleet quantities. No distinction is drawn from the fact

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that the truck is sold for business or commercial purposes while the passenger car is, in the main, sold for personal

or family use. The same holds true for passenger car parts and truck parts."

Mr. President, those two paragraphs are quoted from the decision of the learned judge in the trial court in the case of McComb against Deibert.

Mr. Pepper. Mr. President, will my colleague yield?

Mr. Holland. I yield.

Mr. Pepper. Does the Senator have before him anything to indicate the nature of the truck which was actually involved in that case?

Mr. Holland. I have the entire decision, if my colleague would like to read it.

Mr. Pepper. I call attention to that because I have been informed that it is pertinent to observe that the truck in that case was a distinctive kind of truck, built only for a business purpose, not the kind

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of a truck which would be purchased ordinarily by one expecting to use it for his personal use.

Mr. Holland. In reply, I call to the attention of my distinguished colleague the fact that the paragraphs quoted included no such reference at all, but instead state a general rule and state a general finding and holding of the learned judge in that case. It seems to me that it goes even further than that in the last sentence, which I read, namely:

"The same holds true for passenger car parts and truck parts."

**PLAINTIFF'S EXHIBIT 23.**

History of the Tire Dealer.

The use of the term "retail dealer" in the tire and tube trade appears to be historical rather than descriptive of

the current activities of the tire and tube distributor. Thus, Hugh Allen, in the House of Goodyear, a Story of Rubber and of Modern Business,[1] states that at first the tire and tube manufacturers were primarily interested in selling to car manufacturers. It was only later that the manufacturers became interested in the replacement markets. They began selling in this market through small retail dealers. Thus, Mr. Allen states:

> "Car manufacturers insisted that replacement tires be available where anyone who bought their cars could pick up new tires quickly and easily" (p. 340).
>
> * * *
>
> "Tire dealers were almost all small accounts, many of them former vulcanizers or bicycle repairmen. The retailing had not begun to attract well financed merchandisers" (p. 341).
>
> "The company had been fortunate in getting a gratifying percentage of the original equipment business. . . . However, Stadelman [in charge of sales and later a president of the company] believed a still bigger potential market was to be found in the increasing number of individual car owners over the country" (p. 341).

Albert Abrahamson, in Section III, entitled "The Automobile Tire—Forms of Market in Combat," in Price and Price Policies, edited by Walton H. Hamilton, Professor of Law at Yale University,[2] stated:

> "The early tires bore the mark of unreliability. Not only was their normal span of life short—less than a year—but their life expectancy had set over against it

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1 Corday and Gross, Cleveland, Ohio, 1943 Ed.

2 McGraw-Hill Book Company, Inc., New York, 1938.

blowouts and other casualties. It was highly convenient for the garage to act both as the agency of sale and as the instrument for intermittent repair. As the tire improved in quality, the link with the garage was broken, and a multiple of simple sales agencies entered the tire business. At first these were small shops—auto equipment stores, hardware shops, experimental ventures in the sale of tires new and second-hand" (p. 10).

Warren W. Leigh, in Chapter 5, entitled "Automotive Tires," in Marketing Channels for Manufactured Products edited by Richard M. Clewett, Ph. D., states:

> "Bicycle and carriage shops were the pioneer tire sellers. Then garages, hardware stores and general stores entered the picture. As automobile registrations increased and the tire market grew, specialized tire dealers developed" (p. 125).

Hugh Allen in the House of Goodyear states:

> "Gradually the dealer program evolved which was markedly to influence the industry. The independent dealer was the Keystone. The program was to pick dealers carefully, allot them as much territory as they could adequately handle, give them the fullest possible advertising and merchandising help and provide a Goodyear sales force large enough and intelligent enough to work effectively with them" (p. 342).

The development of the truck followed that of the passenger automobile. Truck transportation began with the substitution of small delivery trucks for horses and wagons in local service. The first trucks were generally converted passenger cars. As manufacturers and merchants realized that if the automobile were to be used for delivering heavy

loads, the chassis must be stronger and larger and the engine more powerful, the manufacture of trucks began.[1] About 1914 Goodyear began replacing solid tires with pneumatic tires. However, the early pneumatic tire was inflated to 70 pounds pressure. Improvements in rubber manufacture produced a low pressure tire which made possible the carrying of heavier loads in lighter vehicles at greater speed. In the twenties pneumatic tires rapidly replaced solid tires. By 1920 truck transportation had increased as the following motor truck registrations show:[2]

| Year | Registrations |
|---|---|
| 1904 | 410 |
| 1905 | 1,400 |
| 1910 | 10,000 |
| 1915 | 136,000 |
| 1920 | 1,006,082 |
| 1925 | 2,440,854 |

Hugh Allen, in the House of Goodyear, states:

> "While there were thousands of individual truck owners, the big market was in fleets of truck, operated by business, construction and supply houses. The fleet owners, the big market was in fleets of trucks, operated preferred to have their tires serviced by one responsible dealer, rather than set up their own plant. This business grew and in time only the larger independent dealers had the finances and facilities to furnish this, and the company store filled this gap" (p. 357).

Albert Abrahamson, in his chapter on "The Automobile Tire—Forms of Marketing in Combat," in Price and Price Policies edited by Walton H. Hamilton, states:

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1 Reck, Franklin M., The Romance of American Transportation, 1938, pp. 201-202.

2 Automobile Manufacturers Association, Facts and Figures of the Automobile Industry, 1941, p. 11.

*Plaintiff's Exhibit 23*

"Another group of important tire buyers is the commercial consumers. Originally the factories themselves solicited these accounts and gave the owners of fleets of cars special discounts. Then the business fell into the hands of factory-owned stores or dealers in the cities, who secured special discounts from manufacturers and passed them on to large buyers. Now the trend is reversed and the manufacturer is again taking over volume sales" (p. 100).

Warren W. Leigh, in his chapter on "Automotive Tires" in Marketing Channels for Manufactured Products, edited by Richard M. Clewett, points out that gasoline service stations, parts and accessory dealers, motor vehicle dealers, automotive repair shops, farm equipment dealers, department stores, chain stores and mail order houses have all gone into the retail tire distribution business. As a result of this, the tire dealer has gone heavily into selling to commercial accounts and to all these types of retail dealers. Thus he is no longer primarily in the retail business. But he is still being referred to as a retail dealer. Mr. Leigh states:

"The character of tire dealers has altered as they adapted themselves to the new competition and to changing market demands. These dealers have become primarily semi-wholesalers, truck tire sellers, and recappers instead of passenger tire retailers. The dispersion of the tire market plus the fact that a little retailer or gasoline station needs to carry only five passenger tire sizes to top 87 percent of the passenger car market has encouraged the multiplication of tire outlets. Tire manufacturers have encouraged tire dealers by their discount programs, to carry tire stocks and sell and supply these small sub-dealers. On the other hand, the drift of passenger tire purchasing from downtown

stores to outlying convenient locations has caused the large, more centrally located dealers to concentrate on the large-volume commercial account business, recapping and other tire services" (pp. 131-132).

**PLAINTIFF'S EXHIBIT 24.**

Confusion in Industry Regarding Definition of a Retailer.

In a letter to the Honorable Aime J. Forand, Chairman, Subcommittee on Excise Taxes, House Ways and Means Committee, Washington, D. C., dated November 28, 1956, which was printed in Part 2 of the report of the Hearings before a Subcommittee of The Select Committee on Small Business of the U. S. Senate, 86th Congress, 2nd Session, on Dual Distribution in the Automotive Tire Industry, R. H. Miner, Assistant Secretary of the Goodyear Tire and Rubber Company, stated:

"Our retail stores also sell to Consumers as well as to other retailers" (p. 383).

**GOVERNMENT EXHIBIT 2 TO DEPOSITION OF WINSTON W. MARSH.**

National Tire Dealers and Retreaders Association, Inc.

(Emblem)

1012 14th Street, N. W., Washington 5, D. C.
MEtropolitan 8-6650.

July 3, 1958

Honorable Clarence T. Lundquist
Administrator
Wage and Hour Division
Department of Labor
Washington 25, D. C.

Re: Proposed Part 779.37 of Title 29, Code of Federal Regulations—Application of the 13 (a) (2) and 13 (a) (4) Exemptions to the Automotive Tire Trade.

Dear Mr. Lundquist:

The National Tire Dealers and Retreaders Association, Inc., is a non-profit trade association whose membership consists of independent tire dealers and retreaders throughout the United States. Following the publication in the June 6 issue of the Federal Register of the proposed revisions to the Wage and Hour Division Regulations by adding Part 779.37 entitled "Application of the 13 (a) (2) and 13 (a) (4) Exemptions to the Automotive Tire Trade," we sent copies of the proposed regulation to each member of our association. As a result we herewith submit for your consideration suggested revisions which we believe will clarify and strengthen this Regulation.

Since one purpose of this Regulation is to clarify the application of the exemption for the individual dealers, we

feel that the terms used in the Regulation should be defined as clearly as possible. Reference is made in Section 779.37 (b) (3) to the term "national accounts" as known in the trade. We believe that a defiintion of a national account would strengthen the Regulation and render it more meaningful to the tire dealers. National accounts are generally considered as those accounts which have the privilege of purchasing tires anywhere in the country and to be billed directly by the tire manufacturer rather than the dealer who delivers the tires. We would suggest, therefore, that Part 779.37 (b) (3) be amended by adding the following statement:

> As used in this section, a national account is an account which takes delivery of tires in two or more states of the United States on a centralized billing or centralized pricing basis, where such billing or pricing is handled directly by the tire manufacturer, it shall be known as a national account sale.

It is our understanding that a sale by an individual dealer to a so-called national account where the dealer bills and is paid directly for the tires would constitute a retail sale. It is only those sales which are handled on the single billing centralized billing or centralized pricing by the manufacturer that would not be considered as retail sales for the purpose of this Regulation.

In sub-section (b) (4) a "fleet account" is defined, but in sub-sections (5) and (6) the phrase "customer's fleet" is referred to without definition. If it is intended that this phrase have the same meaning as a "fleet account," as defined in sub-section (4), then we believe that sub-sections (5) and (6) should refer to this definition. Also in subsection (6) reference is made to sales to a customer's fleet "at a price below the prevailing retail price." If the term

"customer's fleet" in this section is defined, then we suggest that the section be further amended to refer to a "price below the prevailing retail price for such fleet account sales." The purpose of this suggestion is to clarify the retail price which is referred to. It would appear intended that the reference is to the prevailing retail price for such fleet sales rather than the prevailing retail price for individual sales.

We will appreciate your consideration of these suggestions which are designed only to strengthen and make more meaningful this proposed Regulation. This explanation by the Wage and Hour Division we believe will be a significant contribution to the understanding and enforcement of the Wage and Hour Regulations.

Sincerely yours,

NATIONAL TIRE DEALERS AND RETREADERS ASSOCIATION, INC.,

W. W. MARSH,
Executive Secretary.

dl

**GOVERNMENT EXHIBIT 3 TO DEPOSITION OF WINSTON W. MARSH.**

Mr. W. W. Marsh
Executive Secretary
National Tire Dealers and Retreaders Association
1012 14th Street, Northwest
Washington 5, D. C.

Dear Mr. Marsh:

This is in accordance with the request made in your letter of July 3, 1958, and at your meeting with members of

our staff on July 11, 1958, that the following terms used in the automotive tire trade determination be clarified upon final publication of the determination:

(1) **"National account"** sale. This is a sale where delivery of tires is made by the local tire dealer under a centralized pricing arrangement between the customer's national office and the tire manufacturer; payment may be made to the local dealer or direct to the tire manufacturer under a centralized billing arrangement with the customer's national office.

(2) **Customer's fleet.** The definition of "fleet account" in subsection 779.37 (b) (4) also applies to the term "customer's fleet" as used in subsections (b) (5) and (b) (6) of the determination.

Very truly yours,

Administrator.

REX:HH:gt

10/23-11/4/58-11/10

Orig.

cc: General Files

**DEFENDANT'S EXHIBIT C—A. E. STEEPLETON.**

67832

# STEEPLETON GENERAL TIRE CO.

PHONE JA 5-4341

Monroe at Fourth
MEMPHIS 3, TENNESSEE

REG. ☐ CASH ☐ C.T.A.C. ☐ Ex. P. ☐ SP. ☐

SOLD TO Engelberg Packing Co.
STREET 1186 Riverside Drive
CITY City STATE

DATE 19
SALESMAN Corbett

| QUAN. | SIZE AND TYPE | PLY | SERIAL OR BRAND NO. | TREADS USED | TIRE EXTENDED UNIT | UNIT PRICE | AMOUNT |
|---|---|---|---|---|---|---|---|
| | Add'l billing on Inv # 67626 | | | | | | |
| | 1 750 x 20 Traction Rib | 10 | | | | | |
| | Balance | | | | 474 948 | 7017 | 140 34 |
| | Should have been | | | | 474 948 | 78 00 | 156 00 |
| | 16 66 | | | | | 783 | 15 66 |

Sub Total 15 66
67
16 13

...agreed and understood that the title to the above described property remains in STEEPLETON GENERAL TIRE ... said duly ... If this account is not paid when due I, we, or either of us agree to pay all attorney's fees ... all other ... may be incurred in the collection of this account.
RECEIPT OF THE MERCHANDISE IS ACKNOWLEDGED BY:

TIME OUT
SIGNED:
TIME IN
DATE

DELIVER TO:

Defendant C.

**DEFENDANT'S EXHIBIT D—A. E. STEEPLETON.**

63528

**STEEPLETON GENERAL TIRE CO.**

PHONE JA 5-6111

Monroe at Fourth
MEMPHIS 3, TENNESSEE

SOLD TO George Hamer
STREET Hwy 51 Nrg
CITY Millington STATE Tenn
DATE 9/12 [illegible]
SALESMAN [illegible]
(2)

| SIZE AND TYPE | PLY | SERIAL OR BRAND NO. | WHAT | TRADE-IN ESTIMATED | UNIT PRICE | AMOUNT |
|---|---|---|---|---|---|---|
| 750/20 Tru-Ride Cycle | 10 | WE 3-44381 WE 3-4436 | 4 | 9.00 | 78.00 | 136.00 |
| 16.98 | | | | | | |
| 4.96 | | | | | | |
| Used | | | | 9.00 | | 9.00 |
| | | | | | Sub Total | 161.98 |
| | | | | | | 4.96 |
| | | | | | | 170.94 |

I and undersigned, have the title to the above described property vested in STEEPLETON GENERAL TIRE CO. free and clear, and that the same is not encumbered in any manner or subject to any lien whatsoever, except as may be noted herein. I further agree that I will not sell or encumber the same without the consent of the undersigned. Time is of the essence of this agreement. Receipt of this agreement is acknowledged by:

TIRE OUT George Hamer
TIRE IN
DATE

DELIVER TO:

Defendant's Ex a

**DEFENDANT'S EXHIBIT G—WALTER E. de BRUIN.**

February 1, 1954.

Memorandum Taken From Wage-Hour Administrator's 1953 Annual Report to the Secretary of Labor.

**January 25th, Wage and Hour Reporter, Page 1024.**

Administrative Actions.

Taking note of the administrative actions which were taken by the Division during the year, the report notes that opinions were issued on most of the coverage questions presented. The report did not indicate, however, when work on Subpart B of the Division's coverage bulletin would be completed. This bulletin was characterized by the 1952 report as providing an explanation of how the coverage provisions apply to specific industries and to employees in specific occupations, such as employees of wholesalers who distribute within the state goods coming from another state, and employees in the construction industry.

At the present time there is no comprehensive bulletin dealing with what constitutes "hours worked" under the law. Such a bulletin has been in preparation during the past year, and it is expected that it will be issued some time this year.

Turning to the law's numerous exemptions, the report declares that serious difficulties have been encountered in making determinations as to which sales and services are "recognized as retail * * * in the particular industry" under Section 13 (a) (2) and which establishments are "recognized as retail * * * in the particular industry" as required by Section 13 (a) (4).

Some industries, according to the report, do not follow traditional patterns of distribution, and they may deal extensively with large commercial and industrial customers as well as the personal consumer and the small business firm. Elaborating on this point, the report states:

> "In such industries clear lines of demarcation between sales which are recognized as retail and sales which are not so recognized often do not exist, or if they do exist are not readily ascertainable. In such cases determinations can be made only on the basis of careful and extensive findings of fact relating to the entire industry. Even on this basis, however, it is recognized that the lines drawn may only be approximate. Progress has been made in completing industry studies and formulating determinations in a number of such industries, including automobile, coal, farm implements, farm feed, ice, stationery, and tires. Additional work remains to be done, however, before the determinations can be issued."

**DEFENDANT'S EXHIBIT H—WALTER E. de BRUIN.**

Copy

U. S. Department of Labor
Wage and Hour and Public Contracts Divisions
Washington 25, D. C.

March 31, 1954

Mr. George T. Kilmon
Assistant Secretary and Counsel
B. F. Goodrich Company
500 South Main Street
Akron, Ohio

Dear Mr. Kilmon:

Mr. Joseph Goldberg of my staff informs me that on February 4th, in the course of a conference with him, you

expressed interest in the subject of determining what sales are recognized as retail in the tire trade under the exemptions provided by sections 13 (a) (2) and 13 (a) (4) of the Fair Labor Standards Act. He recalls you indicated that the sales practices of the establishments operated by the larger independent tire dealers may differ from those of the tire stores operated by your company. In this connection you suggested that you might explore the matter of industry recognition with appropriate representatives of your company, the Firestone Tire & Rubber Company, and the Goodyear Tire & Rubber Company. We have now reached the point in the study of the subject where such industry data could be of considerable value in the solution of the problem before us. Therefore if you have been able to secure such data we would appreciate receiving it.

In the event you have been unable to proceed with your plan in the above respect, please let us know whether you expect to be able to do so in the near future. In the latter case the approximate date when the information may be available to us will be helpful in the making of our plans.

Should you wish to discuss this matter with us we would be glad to do so at your convenience. In this regard also it would be desirable to proceed at the earliest possible date.

Very truly yours,

/s/ HARRY WEISS,

Assistant Administrator.

**DEFENDANT'S EXHIBIT I—WALTER E. de BRUIN.**

Copy

U. S. Department of Labor
Wage and Hour and Public Contracts Divisions
Washington 25, D. C.

April 16, 1954

Office of the Administrator

Mr. G. T. Kilmon
Assistant Secretary and Counsel
The B. F. Goodrich Company
500 South Main Street
Akron, Ohio

Dear Mr. Kilmon:

This will acknowledge your letter of April 8, 1954, indicating that your company, the Goodyear Tire & Rubber Company, Firestone Tire & Rubber Company, and the General Tire & Rubber Company would like to submit a joint memorandum regarding retail sales or services in the tire industry in connection with the exemption under section 13 (a) (2) and section 13 (a) (4) of the Fair Labor Standards Act. However, it is noted that from two to three months will be needed by you to complete the study of this subject.

I shall be very glad to have such a joint memorandum from your representative group. However, the Divisions are under considerable pressure to reach a determination in the matter and I am not perfectly sure it can be delayed as long as three months. Therefore we would appreciate your doing whatever you can to expedite completion of the

joint study, with a view of getting the report to us as soon as possible. I am sure the material will be valuable to us.

Very truly yours,

HARRY WEISS,
Assistant Administrator.

## DEFENDANT'S EXHIBIT J—WALTER E. de BRUIN.

### Memorandum by B. F. Goodrich, Goodyear, General and Firestone on What "Is Recognized as Retail Sales" in the Tire Industry.

**1. Introduction.**

Because there are thousands of independent tire dealers, both large and small, who conduct their businesses in all sections of the country, as well as because the named companies operate (either through the parent company or subsidiaries) more than 1750 retail stores, the unusual importance of a proper decision in this matter is self-evident. If possible, agreement on this matter between the Administrator and the particular industry is much to be preferred to protracted litigation.

This memorandum is submitted by the named tire companies primarily in their capacities as owners and operators of retail stores (hereinafter called "company stores"), rather than as manufacturers and wholesale distributors of tires. Of necessity, the principal discussion will be of sales made by company stores and those made by independent tire dealers. As used herein, "tires" includes tubes.

Tires are manufactured by many companies and in many sizes and types, not all companies making all sizes and types. The manufacturer may sell his products in any num-

ber of methods, such as sales direct to manufacturers of automobiles or trucks (commonly called "original equipment" sales); direct to distributors or jobbers; direct to dealers who sell to the consumer, and, as in the case of the named companies, a portion of their products to consumers through company stores which sell direct to the consumer. It is safe to state that the greatest number of tires manufactured in the United States are sold direct to independent tire dealers who in turn sell them to consumers, whether individuals, industrial concerns or commercial accounts. We are here concerned with the sales of tires which are made by independent dealers or company stores direct to such consumers.

As used herein "retail sales," "consumer sales," or any similar term, shall be understood to mean sales of tires **made by dealers and company stores** to individuals, industrial concerns and commercial accounts, our chief concern being with sales to the two latter types of consumers which are referred to herein as "commercial sales" or "sales to commercial accounts."

2. **The Background of the 1949 Amendments.**

Since they are well-known to the Administrator, we shall not discuss the history of the Fair Labor Standards Act (hereinafter called "FLSA"), as originally passed in 1938, or the many controversies between the Administrator and members of the tire industry regarding what constituted retail sales prior to the 1949 amendments. It will be recalled, however, that at all such times the members of the tire industry earnestly disagreed with, even though they conformed to, the Administrator's various rulings regarding quantities, discounts, sizes of tires, and the use to which tires were put as being factors which in any way were determinative of the character of the sales involved.

Suffice it to say at this point that the position of the members of the tire industry has been uniform both before the passage of the 1938 Act, after the passage thereof, and both before and after the passage of the 1949 amendments.

It cannot be seriously doubted that the rulings of the Administrator and the approval thereof by the Courts, especially in Roland Electrical Co. v. Walling, 326 U. S. 675, caused such dissatisfaction with the FLSA as to result in the extensive amendments made in 1949. It must be conceded that the change in the retail establishment definition was one of the major changes which, as the Conference Report by the House Managers stated, was necessary

> "in order to obviate the sweeping ruling of the Administrator and the courts that **no sale of goods** or services **for business use** is retail."*

It will be recalled that the Administrator vigorously opposed Senator Holland's amendment and put forth his best efforts to have his own proposal adopted by Congress so as to enable him to continue substantially the same interpretations previously in effect, at least insofar as continuing the requirement that the sale of goods or services for business use could never be a retail sale.

The new rule adopted in the 1949 amendments, namely,

> "**recognized as retail** sales or services in the **particular industry,**"

is clearly mandatory and as the House Managers stated in their Report:

> "Under this test **any sale** or service, **regardless of** the **type of customer, will have to be treated** by the Administrator and courts **as a retail sale,** so long as such sale or service is **recognized in the particular industry as a retail sale** or service."

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* Emphasis supplied throughout.

The House Managers emphasized the importance of industry recognition, as applied to many types of named articles and other articles, by stating that such sales are retail

> "so long as they are **recognized as retail sales** or services **in such industries.**"

It will be recalled that Senator Aiken attempted to amend Senator Holland's amendment by striking out the words, "recognized as retail sales or services in the particular industry," for the reason that he thought it would

> "throw the situation wide open for each industry to determine whether its sales shall be considered wholesale or retail,"

by permitting an industry to change its established practices for the purpose of defeating coverage under the act.

Although he obtained the support of twenty-two other Senators, the proposed Aiken amendment was defeated and the Holland amendment prevailed, clearly because the majority agreed that Senator Aiken's fears were not justified.

We regret to state that the Administrator's Interpretative Bulletin issued in October, 1950, under the title of "Retail and Service Establishments and Related Exemptions," does not seem to give full recognition to the intent of Congress and also seems to indicate a desire on the part of the Administrator to continue in effect, to the extent possible, his previous interpretations that the character of the user, the quantities involved, the discounts granted and other factors are still determining elements in retail sales **generally.** While this position may have merit in some branches of the retail trade, it is respectfully submitted that, as will more fully appear hereinafter, there is no room for such tests in the tire industry.

We do not contend, as Senator Aiken feared might happen, that an industry could completely change its practices

and thereby defeat coverage under the Act. Fortunately, there is no room for any such suggestion in the **tire** industry because there has been no change in its practice and today it treats sales to all consumers as retail sales exactly as it did in 1949 and in any prior year of which we have knowledge, at least as far back as 1934.

### 3. What Constitutes the Tire Industry.

The Administrator has for determination, first, the question of what constitutes the tire industry, and, second, what "is recognized as retail sales" in such industry.

What is recognized in one industry as a retail sale might not be so recognized in other industries, and, therefore, recognition "in the **particular** industry" is all-important. If a sale in a particular industry is recognized as a retail sale, it must be so treated by the Administrator and the Courts. The language of the House Managers is perfectly clear to the effect that it "**will have to be**" so treated.

In his October, 1950, Interpretative Bulletin, the Administrator very properly states that the "distinction between a retail sale and a wholesale sale is a matter of **fact.**" He then makes a distinction between "**in** the particular industry" and "**by** the particular industry," as a result of which he reaches the conclusion that the determination must be wider than the views of an employer or an association of employers and that the determination must rest upon

> "the **understanding and knowledge** of the purchaser as well as the seller, the wholesaler as well as the retailer, the employee as well as the employer, and **private and governmental research and statistical organizations.** The **understanding** of all these and others who have **knowledge** of recognized classifications in

an industry would all be relevant in the determination of the question."

We cannot concur in the Administrator's interpretation that he is entitled to consult persons who are **not** "in the particular industry." Congress limited the recognition to "in the particular industry," and statements of persons **outside** such industry can have no bearing. None of the organizations designated in the above-quoted Administrator's statement are a part of the tire industry. **If** any outsiders are to be consulted by the Administrator, their statements should be limited to **factual** expressions of how sales are **actually treated** in the tire industry. We respectfully submit that, under a proper interpretation of the Act, the **opinions** of "private and governmental research and statistical organizations" and others not in the industry as to how they **think** such sales are treated or should be treated, by the tire industry are wholly irrelevant.

This "particular industry" undoubtedly includes all independent tire dealers and company stores who sell to consumers. It may be that it could include those dealers and companies who operate exclusively as wholesalers, but there is considerable doubt about the propriety of such an inclusion. Whether or not wholesalers are included in the tire industry, there is, and always has been, a definite line of demarcation between wholesale sales and consumer sales and **all** of the latter uniformly have been treated as retail sales, regardless of the quantities, discounts or uses which might be involved.

**4. What Is "Recognized as Retail Sales in the Particular (Tire) Industry."**

Since it is so well known, we assume that it is unnecessary to discuss at length the fact that the establishments of independent tire dealers and company stores are estab-

lishments which have all of the physical characteristics of a store which makes sales and renders services to the general public and that such establishments are stores in the traditional sense of retail establishments. It is also well recognized that some of such establishments make sales of tires for resale (which sales are recognized in the industry as wholesale), but we are here concerned only with those sales which have been suggested by the Administrator as possibly being what he has denominated as "non-retail" sales because of quantity, price, use, or some other factor.

As the Administrator has accurately stated, "recognized" means "known," "understood," or "regarded" and, as stated by others, "treated as" or "practiced" in the industry.

In spite of the clear and unequivocal wording of the 1949 amendments, which were adopted over the Administrator's opposition, the Administrator appears to still cling to some of the same tests which he had promulgated prior to 1949 and, in dealing with retail sales **generally**, has again expressed the opinion that quantities (whether purchased at one time or over a period of time), discounts, and use by the consumer are important elements in the consideration of whether or not a sale is a retail one. Regardless of whether or not the quantity, discount, or use tests are now applicable to sales **in other industries**, such test or tests may not be applied properly to sales of **tires** because neither quantity, nor discount, nor use by consumer has ever been a factor in this particular industry's recognition of what are, and what are not, retail sales.

Unfortunately, because of our general policies regarding the destruction of records, we are not able to go back much more than twenty years, and in some instances much shorter periods, but such period should be more than ade-

quate to demonstrate the uniform practice in this particular industry.

a. **Industry Practices Under NRA Codes.**

It will be recalled that the abnormal business conditions of 1933 brought about the passage of the National Industrial Recovery Act (NRA) in June of that year. Said Act encouraged a wide variety of business and industrial groupings to adopt, by purely voluntary collective action, so-called Codes of fair competition which, when approved by the President, were binding upon all persons engaged in such businesses or industries.

There was approved, on May 1, 1934, Code #410 covering the "Retail Rubber Tire and Battery Trade." This Code is significant because in Section 1 (a) of Article I it states:

> "The term 'Retail Rubber Tire and Battery Trade' or 'Trade' as used herein shall mean the **sale** or offering for sale **to** the **ultimate consumer** and **not for resale** purposes."

It will be noted that the only distinction made in this Code was that between **sales for resale** and sales to the **ultimate consumer, all of the latter being retail sales.** It will be obvious that this Code, which covered all tire dealers who were not engaged exclusively in sales for resale purposes, followed the practice which had theretofore existed in connection with the business of such dealers. As shown by Goodyear Exhibit 4 attached hereto, being a Goodyear Store Profit and Loss Statement for the month of December, and year to date, 1934, **all** sales of tires, whether passenger or truck, were broken down into "DEALER" sales and "RETAIL" sales. (Though unimportant here, the same was true

of sales of batteries.) All of the named companies followed the practice required by the Code, namely, that of treating, as retail, sales which were made to consumers.

b. **Store Practices Following NRA and to the Present.**

After the NRA was declared unconstitutional in 1935, there was no substantial change in the accounting practices used by the stores of the named companies and we believe that the same is true as to independent dealers. In all respects, the company stores continued to make the same simple differentiation between sales to consumers (retail) and sales for resale (wholesale). We are attaching a number of exhibits, but some companies are able to produce more records than others. Such exhibits, and the explanatory notes attached thereto will conclusively establish the following:

(1) Prior to the passage of the FLSA in 1938 the company stores either in their sales tickets or in their accounting procedure (including profit and loss statements), or in both, uniformly **recognized but two classes of sales,** namely, **dealer sales** (which are sales for resale) and **retail or consumer sales.** Sales to consumers were classed as retail sales, regardless of quantity, price, or size or type of tire involved in the sale or the use to which the tire was to be put. The store manuals of instruction regarding the keeping of accounts were based upon the same distinction between wholesale sales and retail sales. It will be noted from the exhibits that the operating statements cover various years prior to the passage of the original Act (and, as will hereinafter be noted, also cover years between such date and the 1949 amendments, as well as thereafter.)

(2) After 1938, but before the passage of the amendments to the FLSA in 1949, the industry continued its practice of record-keeping as described above and continued to treat, for every purpose and in all respects, all consumer sales as retail sales. Part of the attached exhibits cover various years during this period and fully confirm our statement that for the above-named period the term "retail sales[2]" had a well-defined and well-understood meaning in the tire industry and that such meaning was uniformly recognized in such industry. Even though the Administrator, under the original FLSA, had created a new classification ("non-retail"), which was theretofore unknown to the tire industry and with which the tire industry did not agree, nevertheless this particular industry continued to keep its records and to treat its transactions as it had done before but with such supplementary information as was necessary to furnish the Administrator with the six months records on "retail" and on "non-retail" which he demanded.

(3) Neither the procedure nor the recognition has changed since the 1949 amendments, and the tire industry continues to recognize today what it has recognized for many years, namely, that, sales of tires to consumers, including commercial sales, are retail sales regardless of use, quantity or discount and that sales of tires for resale are wholesale.

While we have not made an investigation of any substantial number of tire dealers, it is safe to state that a high percentage of the independent dealers have followed and do follow, in a general way, the accounting systems

used by the manufacturer from whom they purchase tires, especially where such manufacturer also operates its own stores. Irrespective of accounting systems, it is safe also to state that the independent tire dealers have made and do make the same distinction between wholesale and consumer sales as is made by the named rubber companies. We will not labor this point, however, because we assume that independent tire dealers will be given an opportunity to present their facts, either individually, through small groups, or through the National Association of Independent Tire Dealers, with which latter organization, according to the public press, the Administrator already has had numerous contacts on this subject.

5. **Leases Based on Percentage of Sales.**

As further indication of the recognition by the tire industry of commercial sales being retail sales, we call attention to the method of leasing used by company stores and by many independent tire dealers. A high percentage of the stores where tires are sold, whether operated by independent dealers or the named companies, are leased from the owners of the premises. Of course, the provisions of such leases vary with the particular set-up involved, but a large portion of such leases base the rental on the sales made by the store. Some of such leases contain provisions for a stated percentage of the annual net retail sales only and others provide for a stated percentage of the annual net retail sales and a substantially smaller percentage of annual net wholesale sales. It goes without saying that the landlord, of necessity, is most vitally interested in the distinction between retail sales and wholesale sales, and, therefore, the leases leave nothing to conjecture as to what is retail and what is not retail.

As illustrative of the provisions of such leases, we quote the following from the standard Firestone lease, which is

typical of such provisions as demonstrated by one of the B. F. Goodrich exhibits:

"In addition to the monthly rental payments hereinabove provided for in this lease, TENANT agrees to pay to LANDLORD the following contingent rental payments based upon **net retail and net wholesale sales.**

Said contingent rental shall be that sum by which three per cent (3%) of annual 'net retail sales' and one per cent (1%) of annual '**net wholesale sales**' exceeds the minimum guarantee paid annually under Section 5 of this lease.

The term '**net retail sales**' as used in this lease shall include **all retail sales and service** for cash or credit **rendered to the public** by the store operating on demised premises **but not including sales to dealers.**

The term '**net wholesale sales**' shall **include all wholesale sales and service to dealers** for cash or credit rendered by the store operating on demised premises subject to earned bonus and other quantity discounts.

There shall be deducted from all said sales, price, credit, and merchandise adjustments including goods sold on approval and later returned or repossessed, uncollectible accounts, excise tax, and any tax based upon or measured by said sales or receipts from sales made by TENANT which is added to or made a part of the purchase price, whether included in billing price or stated separately. Sales and service to * * * (certain specified accounts) and to other stores of TENANT shall not be included in either '**net retail** sales' or '**net wholesale sales.**'

* * * * * * *

It is understood and agreed by LANDLORD that TENANT has made no representation of any kind as

to minimum or maximum annual volume of **retail and wholesale** sales which TENANT may or shall make any lease year during the term of this lease. LANDLORD agrees not to divulge to any person or persons, firm or corporation, the amount of **net retail and wholesale sales** made by TENANT in said leased premises."

It will be readily apparent that, with the exception of the specifically excluded accounts, all sales to consumers are retail sales and that it makes no difference whatever to either the landlord or the tenant whether such sales are made in large quantities, at varying prices, or what use is to be made of the tires. "Net retail sales" clearly include sales to local commercial accounts, regardless of whether they buy with or without a contract and wholly irrespective of the quantities which may be purchased at any one time or during a period of time and wholly irrespective of the prices at which the tires may be purchased.

Some leases of the above type have been in effect for about as long as tires have been sold through company stores and probably have been in effect for as long as dealers have sold tires.

6. **Conclusion.**

We respectfully submit that there can be no doubt but that, by the 1949 amendments to the retail establishment provisions of the FLSA, Congress intended to exempt consumer sales where such sales had been, and are, recognized in any particular industry as retail sales and that there was to be no limitation thereon as long as such sales were clearly and easily recognized as retail in the particular industry involved. We further submit that for more than twenty years the tire industry has uniformly recognized that sales for resale are wholesale, and that sales of tires

to consumers are retail irrespective of the character of the purchaser, the use to which the tires will be put, the quantities purchased, or the price paid for such tires. This uniform recognition antedates the passage of the original FLSA, continued after the passage thereof and up to the time of the 1949 amendments, and has continued since such amendments to the present time.

Finally it is respectfully submitted that we know of no situation in any industry which could present a more uniform and lasting recognition of all consumer sales as retail sales than is presented by the tire industry.

Respectfully submitted,

.....

GEORGE T. KILMON,
Attorney, The B. F. Goodrich Company.

.....

WALTER E. de BRUIN,
Attorney, The Goodyear Tire & Rubber Company.

.....

RAY SHAFFER,
Attorney, The General Tire & Rubber Company.

.....

HENRY S. BRAINARD,
Attorney, The Firestone Tire & Rubber Company.

**DEFENDANT'S EXHIBIT Q—WALTER E. de BRUIN.**

September 5, 1958

Memorandum for the File.

Re: Conference with representative of the Department of Labor, Thursday, September 4, 1958, 10:00 A. M., Room 5419, Department of Labor, Washington, D. C.

Messrs. George Kilmon, Harold Mull, Ray Shaffer and the writer, representing Goodrich, Firestone, General and Goodyear, respectively, met Mr. Joseph Goldberg as agreed in the Department of Labor offices. He invited the following members of the Department of Labor to participate in our informal discussions—Mr. Jacob Rubenstein (apparently a division head and Goldberg's superior), Mr. Harry A. Tuell, Solicitor for the Department of Labor, and Mr. Hammerman, apparently some subordinate of Mr. Goldberg's who had been active in framing the proposed regulation.

Representing the companies, I stated that we had received the proposed regulations determining what a retail sale was in the automotive tire trade and we noted that it stated investigation had been made and that these proposed regulations were the result of such investigation. I stated that in accordance with our brief, we knew of no practice in the tire industry which would support such conclusions and we were interested in the type of investigation that had been made, whether hearings had been held, and what type of supporting evidence had been obtained. After some attempt to answer my question generally, Mr. Mull asked if they had ever prepared a written summary of their investigation. Mr. Goldberg stated that they did not have a formal report but this was a sum-

marization of what they were able to gather from other agencies and practices and that they had a backing up of these various conclusions (it became apparent that the group had taken the general desire of the Secretary of Labor to use prices and quantities as a measuring stick of retail business and to supply them in the tire industry as they had previously applied them in several other industries for which similar regulations have already been issued).

After all of us had indicated dissatisfaction with the proposed regulations, we were invited to discuss the separate divisions, to indicate problems which we felt they presented. We stated that we still felt the history of the legislation showed the congressional intent not to use prices or quantities as the Secretary of Labor had contended, and that the section in the amendments to the Fair Labor Standards Act which provided for recognized retail sales or services **in the particular industry** protected particular industry practices. Then Mr. Kilmon spoke of their subparagraph 2 which had to do with sales made pursuant to formal invitations to bid. He pointed out that in many cases invitations to bid, and particularly national account sales in their subparagraph 3, were handled by the central office or by a division point and that the only participation a local store had in such cases was perhaps furnishing a small amount of tires under that order. Mr. Tuell mentioned that the Department had always taken the position that on sales such as national account sales the store should be charged, for purposes of determining its percentage of retail business, with the total amount of the sale in which they participated, even though they only got a handling charge or a commission and had nothing to do with the invoicing or billing of the sale. Upon our expressing surprise and shock at that interpretation, he admitted that it

had been tested in Court and that the District Court had disagreed with their viewpoint and that they had never carried it further, but they must insist on that interpretation. In discussing the subsection for fleet accounts, we pointed out the ambiguity of such phrases as wholesale prices or prices typically charged on sales for resale. We pointed out that in the present buyer's market a price for one tire might vary between two customers in the same store, depending upon the sharpness of their bargaining ability. We pointed out that we did not use fleet prices. At this point Mr. Rubenstein stated that under OPA the industry had used a similar definition of "fleet" as an owner or operator of five or more trucks. We stated that we could see no connection between a law which was used to regulate maximum prices by the Government and was imposed on industry and the present industry practices, even if there had been such a precedent. We further stated that we had no knowledge of specific fleet price or fleet quotations.

We then skipped over to those provisions of the proposed regulation which had to do with retreading or recapping. It was pointed out that none of us had any disagreement over large regional retread plants since there could be no question of their type of business. We stated, however, that there was considerable doubt in our minds covering store locations which had, as a department, a retreading operation. It was pointed out that in many of these stores a customer might wish to have his smooth tires recapped but be unwilling to wait or to return, and the store might take his casings, giving him in return other casings that had been recapped. Mr. Rubenstein asked if it wasn't true that in such recapping departments their hours might be more regular than other departments, and it was pointed out that that was probably not true. It was pointed out

that in cases of approaching busy seasons, such as recapping of tires with winter treads, we might find instances of extreme variation of hours by employees in retreading departments. We stated that we felt their proposed regulations would make it difficult for people in our positions who, from a central office, were attempting to police our various locations. It was pointed out that it would be almost impossible for us to protect ourselves against some eager store manager who might handle retreads in such a manner that we could not tell whether they were actually returned to the customer or sold to other customers. This point seemed to draw some attention of Mr. Goldberg and he seemed generally sympathetic.

The meeting concluded after about two hours with their suggestion that we submit some proposed amendments to their regulations. We stated that we would like to consider that in caucus. The representatives of the Department then suggested that we consider that over the lunch hour and that, if we wanted to confer further, they suggested a two o'clock meeting. They said, however, if we wished to submit a further memorandum on the subject we could advise them by telephone.

At our lunch the representatives of the companies decided that there was no point in further conference but that we should ask them for an additional 30 days in which to decide whether we would file additional memoranda or not. Mr. Goldberg's office was so advised.

Attorney.

W. E. de BRUIN.

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**DEFENDANT'S EXHIBIT R—WALTER E. de BRUIN.**

The Goodyear Tire & Rubber Company
Akron 16, Ohio

October 9, 1958

Mr. Joseph Goldberg
Wage & Hour & Public Contracts Division
United States Department of Labor
Room 5419
Washington 25, D. C.

Re: Proposed Amendments to Part 779 of Title 29 CPR
Regulations Pertaining to Automotive Tire Trade.

Dear Mr. Goldberg:

You will recall that at our request you were kind enough to arrange a meeting at which the undersigned, as representatives of our respective companies could discuss with you and some of your associates the above-mentioned regulations. At the conclusion of that meeting you invited us to submit in writing any further comments that we might care to submit on this subject. That is the purpose of this communication.

During the course of our conversation, and in answer to our inquiry concerning the factual basis for your proposed regulations (which indeed submit a new concept of retail and wholesale sales into our particular industry), one of your associates suggested that there was some support for such distinctions in the rubber industry practice under OPA and its accompanying regulations. Without in any way admitting that such an analogy was sound or reasonable, we asked for more detail, but none was furnished. We therefore asked for some time in which to canvass our respective companies on this matter.

In the relatively short period of time available to us since our conference, each of us has attempted to canvass his respective company. Upon comparing notes, however,

we have discovered no such support as was indicated might exist for the position which your department has proposed to take. For instance, our sales people have pointed to official documents of OPA which they say are representative of the practice in the tire industry during the entire life of OPA. In RPA 63, issued on February 13, 1943, by the Office of War Information for OPA, Part 1315—Rubber and Products and Materials of which Rubber is a Component, Section 1315.108 Definitions (2) reads as follows:

> " 'Sale at retail' means any sale to a purchaser for use by such purchaser and not for resale."

Again NPR 143, issued April 2, 1943, by the same Office of War Information for OPA, Part 1315.1510 contains as subparagraph 3 the identical definition of sale at retail as quoted above following paragraph (2), which reads as follows:

> "(2) 'Sale at wholesale' means any sale, other than a sale to a vehicle, manufacturer for original equipment of such vehicle, except a sale at retail."

The OPA regulations and practice therefore support our view that all sales to consumers for their own use have been recognized as retail sales in the tire industry for many years. Your proposed regulations entirely disregard this industry practice, contrary to the Congressional intent and the specific wording of Section 13a (2) of the Fair Labor Standards Act as amended. We recognize the possibility that we may have misunderstood your reference to the OPA practice. Therefore it would be greatly appreciated if you could furnish us more detail either concerning the reference of your associates to the practice of the tire industry under OPA administration or more generally concerning any of the other factual findings for our industry upon which the proposed regulations are founded.

This matter is of deep concern to the tire industry. We believe that the record will show our acceptance of and

compliance with the Fair Labor Standards Act and its amendments. The Administrator has invited our suggestions and comments on these proposals and we have accordingly given this matter our most serious consideration. We would indeed be remiss in our duty if we did not express our sincere conviction that not only are these proposed regulations unworkable, but they are entirely contrary to the practice which has prevailed for a great number of years in the tire industry.

All of us realize how much simpler and more satisfactory it is if differences of viewpoint may be worked out in advance of the issuance of regulations. Knowing that your department must share this view, we sincerely hope that you can give us the information which we have requested here. Further than that, if you feel that more complete information on this subject can be gained either by a general hearing for the industry or by further conferences with us, we are anxious to make ourselves and our information available for that purpose.

Sincerely,

GEORGE T. KILMON,
Attorney, The B. F. Goodrich Company.

HENRY S. BRAINARD,
Attorney, Firestone Tire & Rubber Company.

WALTER E. de BRUIN,
Attorney, The Goodyear Tire & Rubber Company.

RAY SHAFFER,
Attorney, The General Tire & Rubber Company.

**DEFENDANT'S EXHIBIT S—WALTER E. de BRUIN.**

U. S. Department of Labor
Wage and Hour and Public Contracts Divisions
Washington 25, D. C.

Nov. 25 1958

Office of the Administrator

Mr. Walter E. de Bruin, Attorney
The Goodyear Tire & Rubber Company
Akron 16, Ohio

Dear Mr. de Bruin:

This is in reply to your letter of October 9, 1958, addressed to Mr. Joseph Goldberg of my staff, concerning the proposed determination on the application of the 13 (a) (2) and 13 (a) (4) exemptions under the Fair Labor Standards Act to the automotive tire trade.

The views expressed in your letter as well as in the brief previously submitted and in the conferences and correspondence with the Divisions will be given careful consideration in reaching a decision on this matter. I note particularly your reference to classifications by the OPA. I am informed that the reference made to the OPA at the September 4, 1958, conference which you had with members of my staff concerned only the definition of "fleet account" as contained in the proposed determination. As you know, in developing the proposed determination, consideration was given also to classification of other agencies including the Economic Stabilization Agency, the SIC and the Census as well as the views and evidence of recognition furnished by other members of the industry and other interested parties.

We believe that an adequate opportunity has been given to all to present the facts, evidence and information bearing on the determination as to what sales and what establishments "are recognized as retail" in this industry. You will be informed when final action is taken.

Very truly yours,

CLARENCE T. LUNDQUIST,
Administrator.

cc: Mr. George T. Kilmon, Attorney.

Mr. Henry S. Brainard, Attorney.

Mr. Ray Shaffer, Attorney.

(Emblem)

**DEFENDANT' S EXHIBIT A—WINSTON W. MARSH.**

National Association of Independent Tire Dealers, Inc.

Executive Office . . 1302 Eighteenth Street, Northwest
Washington 6, D. C.
Telephone: HUdson 6100

February 21, 1950

Administrator, Wage Hour Division
Department of Labor
Washington, D. C.

Dear Sir:

I would appreciate your opinion as to the applicability of Section 13 (4) of the Amended Wage-Hour Act to the employees of retail tire dealers in the light of two situations prevalent in the industry.

The members of our Association are classified as "independent tire dealers." Their primary function is to buy tires from the manufacturers at wholesale and to sell them to other dealers or to the consuming public. Essentially, they fall within the classification of wholesalers or retail merchants. They are not mere gasoline "service stations," although they may also sell gasoline as a service station would.

(1) **Vulcanizing and Recapping Service by Tire Merchants.** One of the situations that prompts this letter is the fact that many of our members, in addition to selling new tires to the ultimate purchaser or other retailers, perform vulcanizing and recapping services. Paragraph 71 of Interpretative Bulletin No. 6, originally issued in December of 1938 and revised in June 1941, had this to say about section 13 (a) (2) of the Act prior to the recent amendments:

> Section 13 (a) (2) does not apply to establishments engaged in tire retreading or tire recapping. Such processing activities involve the rebuilding of tires and are seldom performed by the ordinary garage, tire dealer, or service station. Tire dealers and service stations sometimes accept tires for retreading or recapping, but usually the work is performed by an independent tire retreader or recapper.

This is not only erroneous in point of fact but it seems to say that any establishment engaging in tire retreading or tire recapping cannot be classified as a retail establishment. So far as it does so, we think it misconceives the nature of vulcanizing and recapping.

"Vulcanizing" is the process of repairing a tire by fastening new rubber, or cord, or both to weak spots by means

of heat. The process is very simple and the tools required are few and inexpensive. Many service stations perform this type of service. The overwhelming preponderance of our members engage in vulcanizing as a service to the customers. Some vulcanizing repairs replace scuffed or cut rubber, or cord, in the shoulders, side-walls, or tread of the tire. Where the tread is seriously worn, the term usually applied to the repair of the tread is "recapping." Not only are vulcanizing and recapping actually repair services, but they are regularly performed by tire dealers. In the latter connection the official **Standard Industrial Classification Manual**, obtainable from the Government Printing Office, recognizes that tire dealers (Industry 5531) have facilities for "tire recapping and vulcanizing" and that "tire repair shops" engage in "repairing and retreading" (Industry 7534) whereas "establishments primarily engaged in retreading automobile tires on a factory basis" are a separately classified rubber industry (Industry 3099).

Tire repair and vulcanizing is a service operation which starts in a simple manner with the small service station and garage. There the injured tire, which probably has broken cords caused by a bruise or penetration from some foreign object, is removed from the wheel, disassembled and repaired. Such repair can be so simple as the use of a "boot" or small cord patch, which is laid in the tire with cement or gasoline. Some devices are marketed to provide better facilities and tools for this job such as a small hand spreader, work bench, mandral, stitcher, etc. The more aggressive operator can install, without too large an investment, a small electric mold or press on which a semi-cured repair unit can be quite satisfactorily cured in the tire, restoring it to full and lasting service. This type of service operation is a graduated step from the simple service station operation on the one hand to the large tire

dealer who offers "one day service" with a varying arrangement of electric or steam molds designed to handle even the largest size of truck or off-the-road tires. This work is performed in the same manner with new live cord replacing the damaged and broken cord within the tire. Equipment used in the larger establishments is generally accurately controlled by means of gauges, regulators, check valves and traps and operated by an experienced technician—but the principle of operation remains the same as those used in the simple service station type of repairing mentioned above.

As stated above, some repairs replace scuffed or cut rubber in the shoulders and tread of the tires. This is "recapping." As long as the cord of the tire is sound, it is economical to replace the scuffed rubber on the tread of the tire with the service known as recapping. Since the cord body of the tire represents almost two-thirds of the initial cost of the tire, any step taken to protect that investment is wise as well from the point of safety, particularly since smooth tires skid much more easily in any kind of weather than tires with some tread. Recapping service has become popular to the point that "8-hour recapping" is featured by many tire dealers. The customer's car is jacked up during the day while the tires are being repaired or recapped much in the manner that the shoe repair shop offers service to the public. Indeed, the accepted vernacular for tires is "shoes".

As previously mentioned, this recapping operation consists of replacing tread on a tire in approximately the same manner that a tire is repaired, after which the stock used is cured in a mold or steam chamber. Tubes, rubber boots, aprons, rubber industrial products, etc., are treated and cured in exactly the same manner and this is a commonly

accepted service. The addition of a "knobby" or snow tread for the winter months is also a practice gaining in popularity in the recapping field. The service possibilities of the tire recapper-repairer are extensive and growing both in the simple service station operation and the larger tire shop.

"Recapping" as done by our members can be classified in three categories. (1) If the owner of a tire worn smooth by use wishes to have a new tread placed upon the tire, he may take his tire to the establishments of our members and they will replace the tread. This is akin—as we have said—to the situation of a man taking his shoes to a cobbler to be repaired or resoled. This type of service may be designated as "service recapping". (2) Another type may be called "retail recapping". It is the custom in the industry to allow a trade-in allowance on old tires when new ones are purchased. Many of the tires turned in are in need of recapping service. Accordingly, many of our members "recap" the tire before offering it for sale second-hand. (3) A third category is "wholesale recapping". Some of our members, although their principal interest is in selling tires, not only engage in "service" and "retail" recapping for themselves, but they also recap tires at the request of other tire dealers who for some reason prefer not to perform such a service themselves.

For present purposes, it may be assumed that: (1) Over 50% of the establishment's annual dollar volume of sales are made within the state in which the establishment is located. (2) Seventy-five per cent of its annual dollar volume of sales are not for resale. (3) Seventy-five per cent of the establishment's annual dollar volume of sale are recognized in the particular industry as retail sales. (4) The establishment is recognized as a retail establishment in its

particular industry. (5) More than 85% of the establishment's annual dollar volume of sales of goods which it makes or processes are made within the state in which the establishment is located. (6) The goods which the establishment makes or processes are made and processed at the establishment which sells the goods.

In this setting our questions in regard to vulcanizing and recapping service as it affects the applicability of section 13 (4) of the amended Act are as follows:

**First:** Does the mere fact that a store performs vulcanizing and recapping services remove it from the retail exemption?

The Conference Report states, with reference to section 13 (4) of the amended Act, that:

> This exemption will apply typically to bakery establishments which bake the breads and pastries which they sell, ice plants which manufacture the ice they sell, and ice cream parlors or candy kitchens which make their own ice cream or candy.

We would like to know if vulcanizing is also considered in that exempt category. Vulcanizing is merely a repair service, as compared with the manufacture inherent in a bakery or ice cream or candy plant; it is sold as a service, whereas the latter are sold as commodities produced by the retailer. For that reason the situation of our member retailers seems to us an a fortiori one. We would have no doubts on this score if it were not for Paragraph 71 of Interpretative Bulletin No. 6, described above.

**Second:** If vulcanizing and recapping do not per se disqualify a retailer from coming within the exemption of section 13 (4), would a retailer tire dealer be removed from the exemption by engaging in any of the types of recapping

described above as (a) service, (b) retail, or (c) wholesale? Here we think the same essential considerations apply as in the case of vulcanizing.

(2) **Prior Differentials.** The second situation prompting this letter is the custom in the industry to sell at a price which declines as the amount of tires purchased by a buyer increases. In other words, consumers are customarily given a discount proportioned to the size of their orders.

The pricing structure of the rubber tire industry is intricate. Every rubber tire manufacturer provides his dealers with a suggested list price for both passenger and truck tires which is used for two purposes. From this list price dealer cost discounts are computed in sales by manufacturers to dealers. From the same list prices dealer discounts in their sales to consumers are also calculated. There is a peculiar nomenclature used in the industry to describe the amount of these consumer discounts, usually in terms of 10%. The first discount is usually 10% of the suggested list price. The second discount is usually 10% of the price after the first 10% discount has been deducted. This is described as "10 and 10" and means ten per cent off the list price after the deduction of the original 10 per cent discount. If a further discount is made it is designated by similarly deducting another 10% or 5%. Thus if a large purchaser were offered what is described as a 10-10-10 discount, it would mean that 10% would be discounted from the original price, 10% from the resulting price and a final 10% from the latter figure.

The manufacturer recommends to his dealers that a discount or trade-in of 10% or 10 and 10% be offered consumer purchasers of **passenger** tires in order to obtain their business. The same pricing practices obtain for **truck** tire

business. Recommended discounts for truck tires to the commercial users are 10-10%, with a suggested 10-10-10% for the larger fleets and 10-10-10-10% where delivery is made to "national" accounts such as Swift & Co. operating motor vehicles in many places. (One larger tire manufacturer has a discount program of 10-10-10-5%, with an increase to as much as 10-10-10-10-10-5% for the very large buyer; if the dealer sells at this latter discount, he can replace his stock from the manufacturer at a corresponding discount.) Technically, the independent tire dealer can refuse to deliver his merchandise to consumer purchasers at these discounted prices, but he makes such a decision with full knowledge that the company-owned store of one of the tire manufacturers will quickly take over the account and might even quote a larger discount.

Again, many of our members sell tires in large quantities to trucking companies at a special discount from the list price, both the discount and the list price being suggested by the manufacturer.

The prevailing market price of truck tires is substantially below the aforementioned suggested list prices. The reduction is offered because of the advantages stemming from the large volume sale. Fair Trade Acts are not pertinent. (Since the sales are direct from the tire dealer to the ultimate consumer, the sales have always been considered as "retail" in the industry and would appear to be truly of that nature.) But a problem arises in this connection because of paragraph 70 of Interpretative Bulletin No. 6, which states that "nonretail sales" include:

> (2) sales to business or industrial purchasers in quantities materially in excess of the quantities normally purchased by individual purchasers and at a special discount from the regular retail price, and (3)

sales of the type of goods, such as heavy truck or bus tires, not purchased by the general consuming public.

Bus, as stated above, the reduction offered in such sales as described in (2) and (3) of paragraph 70 are offered in order to obtain business rather than because the sale is something other than a retail transaction.

**The question** we have in this regard is: What is the opinion of the Administrator in relation to the nature of large volume sales made at a generally recognized and applicable discount to large trucking concerns and to commercial or industrial user-purchasers? (As previously stated, such sales are, and are considered in the industry to be, retail sales—but Interpretative Bulletin No. 6 evidently treated such sales as "wholesale.") Does the Administrator now consider such sales as "retail" or "wholesale" business? If the latter, what may we do to have the facts re-examined and a fresh interpretation issued?

We will be glad to supply you with further information or aid in this connection.

Very truly yours,

NATIONAL ASSOCIATION OF INDEPENDENT TIRE DEALERS, INC.,

W. W. MARSH,

General Manager.

ds

**DEFENDANT'S EXHIBIT B—WINSTON W. MARSH.**

U. S. Department of Labor
Wage and Hour and Public Contracts Divisions
Washington 25, D. C.

Office of the
Administrator

Dec 15, 1950

Mr. W. W. Marsh
General Manager
National Association of Independent Tire
Dealers, Inc.
1302 18th Street, N. W.
Washington 6, D. C.

Dear Mr. Marsh:

An Interpretative Bulletin regarding the application of Sections 13 (a) (2) and 13 (a) (4) of the Fair Labor Standards Act to retail and service establishments generally has recently been issued. That Bulletin does not cover many details of the application of these exemption provisions to specific types of operations in the automobile tire trade.

To provide a basis for a more detailed interpretation of the application of the exemption provisions in that industry, I have asked our Division of Research and Statistics to prepare an analysis of the pertinent factual data. Among the factors to be considered are the views of trade associations as to what types of sales or services are recognized as retail sales or services, and what types of establishments are recognized as retail establishments in the industry.

To assist in completing this study, I would greatly appreciate your furnishing, at your earliest convenience, a statement setting forth in detail the views of the National

Association of Independent Tire Dealers, Inc., on the questions listed in the enclosed questionnaire, as well as on other pertinent points, and the basis for the Association's conclusions, including supporting data.

Already available for this purpose is your letter to me dated February 21, 1950, which bears on these questions. The information contained in that letter need not, of course, be repeated.

The statement should be addressed to Mr. Max Schiferl, Acting Director, Division of Research and Statistics, Room 5138, Department of Labor Building, Washington 25, D. C. Should you have any questions regarding the type of statement which would be most useful, I suggest that you take these up with Mr. Schiferl by calling Executive 2420, extension 1306.

Yours very truly,

WM. R. McCOMB,

WM. R. McCOMB,

Administrator.

Enclosure: "Questions Pertaining to the Automobile Tire Trade."

Questions Pertaining to the Automobile Tire Trade.

A. Automotive Parts, Accessories and Tires.

1. What proportion of the sales of automotive parts and accessories and/or tire distributor-dealers are made to commercial, industrial, governmental or institutional customers?

2. On the average, what proportion of the sales of tire, battery and accessories dealers are for resale or of a type not recognized as retail in the industry? How does the Association distinguish between sales of parts that are

recognized as retail and those that are not so recognized in the industry?

3. What proportion of automotive parts and accessories and/or tire dealers make at least 75 percent of their sales not for resale and of a type recognized as retail in the industry.

4. What is the pattern of discount practices in the sale of automotive parts and accessories:

a. to dealers for resale?

b. to commercial, industrial, governmental or institutional customers?

c. to personal consumers?

5. In the letter of the National Association of Independent Tire Dealers, Inc., dated February 21, 1950, there are mentioned various discounts in sales of truck tires in terms of "10-10-10 percent" to larger fleet users, and "10-10-10-10 percent" to national accounts, such as Swift and Company, operating motor vehicles in many places. Does the Association consider such sales to be wholesale or retail sales? Do these sales involve a contract under which certain firms agree to buy either specified quantities, or total requirements for a stated period? Who are the contracting parties? Could you furnish any facts regarding such transactions?

B. Tire Vulcanizing, Retreading and Recapping.

6. In the letter just mentioned reference is made to vulcanizing, retreading and recapping as if these operations were identical. What exactly is the difference between these three processes? Do tire dealers do retreading and recapping as well as vulcanizing?

7. Are the processing operations in vulcanizing, retreading and recapping similar to those in manufacturing new

tires? In what ways are they similar and in what ways different?

8. Again referring to the letter of February 21, what is the difference between the tire vulcanizing, retreading and recapping operations performed by the larger tire dealer in his shop equipped with "steam molds designed to handle even the largest size of truck or off-the-road tires" and with equipment "accurately controlled by means of gauges, regulators, check valves, and traps"—and the operations in establishments primarily engaged in vulcanizing, retreading and recapping tires on a factory basis? Just what is meant by "factory basis"?

9. How does the machinery of a tire vulcanizing, retreading, and recapping factory differ from that of a large tire vulcanizing, retreading, and recapping shop operated by a tire dealer? How do the operations differ? Is there any difference in the training and ability required of the worker?

10. Are tire vulcanizing, retreading, and recapping shops operated by tire dealers separated from the tire store? Which of the employees who work in the store also perform functions in connection with the work of the vulcanizing, retreading, and recapping shop?

11. On the average, what proportion of the tire dealers' total receipts is derived from vulcanizing, retreading, and recapping:

a. tires owned by customers?

b. tires owned by themselves and reconditioned for sale?

c. total tires?

12. On the average, what proportion of tire dealers' total receipts is derived from vulcanizing, retreading, or recapping customer-owned tires:

a. for other dealers?

b. for fleet operators, trucking firms, bus and taxi companies?

c. for other commercial, industrial, governmental and institutional customers?

d. for personal consumers?

13. Is the vulcanizing, retreading, or recapping by tire dealers of tires owned by fleet operators, trucking firms, bus and taxi companies, or by other commercial, industrial, governmental or institutional customers considered a wholesale or a retail transaction?

14. Is the vulcanizing, retreading, or recapping by the dealers of customer-owned tires, on a contract basis as a result of competitive bidding for commercial, industrial, governmental or institutional customers considered a wholesale or a retail transaction?

15. Is the sale by tire dealers of tires which they have vulcanized, retreaded, or recapped ever considered a retail transaction? Are establishments operated by such dealers recognized as retail establishments in the industry?

**DEFENDANTS' EXHIBIT C—WINSTON W. MARSH.**

January 19, 1951

Mr. Max Schiferl
Acting Director
Division of Research and Statistics
Room 5138, Department of Labor Building
Washington 25, D. C.

Dear Mr. Schiferl:

In a letter dated December 15th, signed by Mr. McComb, the administrator of the Department of Labor, this office

was requested to dig up some material and answer some 15 questions relative to the Wage-Hour Law as interpreted for the retail tire industry.

We have been giving this matter our very careful consideration and have honestly and sincerely tried to answer these questions in the manner the request indicated. You can be sure that if there is further information or other material that we can bring to light which will help you, we would be pleased, not only to come to the Department of Labor for any conference that you might want held, but to develop further information which might help you get a clear picture of the retail tire industry as we know it.

Sincerely yours,

NATIONAL ASSOCIATION OF INDEPENDENT TIRE DEALERS, INC.,

W. W. MARSH,

General Manager.

np

cc: Mr. McComb.

Mr. Kimble.

1. By and large automotive parts are not a functional part of the items offered for sale by the tire dealer. Tire dealers do, however, sell some automotive accessories. Industrial, governmental, and institutional sales are classed with trucking accounts as commercial sales. The percentage of volume in such commercial sales ranges from around 17 percent in the case of dealers doing less than $15,000 annual volume to approximately one-third in the case of dealers doing over $15,000 annual volume.

2. (We classify a retail sale as one made to the consumer. If a tire is purchased for resale it is counted as wholesale.) Dealers doing less than $25,000 annual volume

sell from 5 to 20 percent of their tires at wholesale. Those are usually small sales made to car dealers for spares, etc., or to small garages, service stations, and the like, and do not constitute a fundamental part of their operation. About 35 per cent of the dealers are in this group. The medium size dealer of from $25,000 to $150,000 annual volume does around or sometimes slightly over 25 percent at wholesale. About 55 per cent of the dealers are in this group. The large size dealers with an annual volume of over $150,000, which comprise about 10 percent of all dealers, do around one-third to as high as about 40 percent of their business at wholesale.

3. Automotive parts dealers cannot be classified with tire dealers. At least 35 percent of all tire dealers make at least 75 percent of their sales not for resale and of a type recognized at retail in the industry.

4. Dealers in automotive parts and accessories are not considered to be tire dealers and therefore we are unable to give an answer to this question.

5. The sales in question to large fleet users and national accounts have always been considered in the tire industry and by the Association as retail sales, since they are made to the consumer. The contracts covering such sales are customarily open purchasing contracts, on occasion are for specified quantities, but practically never are for total requirements. Such contracts usually stipulate the price at a stated discount from list price.

In the case of sales to large fleet users, the contracting parties may be either the manufacturer or the dealer as the seller, and the user as the buyer. Where the manufacturer makes the contract, it or its company-owned stores will in most cases make the deliveries also. In some instances, however, the individual orders under such con-

tracts will be filled by the dealer, for which he will receive a stipulated discount or percentage. The business of this kind done by dealers represents in general only a small proportion of their total business. To some extent the dealers themselves make such contracts with large fleet users, and, of course in such cases make the deliveries under the contracts. In such instances the dealers must, of course, quote prices comparable to those offered by the manufacturers or they have no chance of obtaining the business. Thus where dealers enter into such contracts the sizeable discounts given are not because such business is considered wholesale, but only because it is necessary to do so to obtain the business in view of the various discounts offered by other interests.

In the case of national accounts, the contracting parties are customarily the manufacturers and the user. The sales or deliveries under the contracts are usually made by the manufacturers themselves or through company-owned stores. A small part of such sales or deliveries, however, are made by independent tire dealers pursuant to the contracts negotiated by the manufacturers. In such cases the dealer fills the order of the local branch of the national account at the price stipulated by the manufacturer and receives a fixed discount or percentage on the sale. In so far as the dealers are concerned their involvement in such transactions constitutes only a small percentage of their business.

(As I pointed out in my letter of February 21, 1950, however, in this industry sales cannot be classified as other than retail on the basis of the size of the discount, because the discount structure is extremely complex and encompasses a myriad of variations. Practically all sales to consumers, even those of one or two tires to an individual user, are made at some kind of a discount.) As the number of

tires increases the discount will usually increase. This is done not because such sales in particular quantities or to particular kinds of users are considered wholesale, but because as the size of order increases the number of various interests in the industry interested in the business increases, and therefore the larger discounts are necessary to obtain the business. (As stated previously, all of these sales to commercial users, including sales to large fleet users and national accounts, are considered by the Association and the tire industry as a whole as retail sales, for the very practical reason that they are sales to the ultimate consumer.)

6. Recapping and retreading are substantially identical operations. Vulcanizing is somewhat different. Vulcanizing is the process of repairing a tire by fastening new rubber or cord, or both, to weak spots by means of heat. This type of repair is confined to the remedying of injured or bruised spots in an otherwise usable tire. It is a rather small operation and is customarily done on a tire brought in and left for repair by the user. Recapping and retreading consist of replacing the rubber or tread on a tire in which the cord is sound. This is not customarily confined to a single spot on a tire, as is vulcanizing, but involves the addition of an entire new tread or cap. This type of operation is more substantial than the vulcanizing operation, but still not comparable to the manufacture of a tire, since the cord body of the tire represents about two-thirds of the initial cost of a tire. In general, tire dealers do retreading and recapping as well as vulcanizing.

7. The processing operations in vulcanizing, retreading, and recapping are not at all similar to those in manufacturing. Vulcanizing is simply the repair of a spot in a tire. Recapping and retreading are simply the adding of rubber to the shoulders or tread, or both, of a tire. Manufacturing

involves the much more complex problem of "building" a tire in its entirety, including both cord and rubber. The single similarity in processing is that in vulcanizing, retreading, or recapping the new rubber added is cured during the operation in much the same manner that it is cured in manufacturing. A good parallel to this operation is that in the shoe repair field. The shoe manufacturer makes the entire shoe, just as the tire manufacturer builds the entire tire. The shoe repair shop repairs holes in shoes, much the same as a vulcanizer repairs bruises or holes in tires. The shoe repair shop also puts on new soles, just as the recapper or retreader puts on a new tread. Vulcanizing, retreading, and recapping are service operations and are customarily performed on tires brought in by the users.

8. "Factory basis" refers to recapping shops such as those operated by the tire manufacturing companies. The manufacturers have these at strategic locations across the nation and operate solely on a wholesale basis. There they do work for other tire dealers who do not have such equipment. There are a very few independent tire dealers who operate on a similar basis. Most independent tire dealers, however, even including those large dealers who have the type of modern equipment mentioned, do their work on a retail basis for users in the local community.

9. The machinery of a manufacturer doing repairing or recapping on a factory basis is in some cases much the same as that of a large tire dealer operating a local service shop, except that the greater volume of the establishment operating on a factory basis usually requires more machinery. Of course, as among the local dealers the type and amount of machinery vary widely depending upon the volume of repair business done and the size of tires taken in for repair. The operations on a factory basis differ from

those on a dealer basis primarily in that the former is on a larger scale and at wholesale, whereas the latter operates on a retail basis providing service for users in the local community. In general, there probably is no difference in the training and ability required of the worker.

10. Shop locations vary with every city. While in some instances the repair shops of tire dealers are physically separate from the tire store, they are usually together. Except for the very small one to the three mold shop, recapping personnel confine their efforts to the shop alone.

11. It is impossible to give a full answer to this question because of the great variation as among dealers. Some dealers do not perform any tire repair or recap work. Some engage in that service on a substantial scale. In general, however, it may be said that, taking the total receipts of tire dealers as a whole, the proportion of such receipts derived from vulcanizing, retreading and recapping would be rather small as compared with that received from the sale of new tires. Of the receipts from repairing and recapping, by far the greatest part would be from tires owned by the customer. Some dealers do only such service work. Others do some repair work on tires they take in on trade-in and then resell at retail. But in general this amounts to only a very small percentage of the total amount of repair and recap work done by dealers, and, of course, represents an even smaller proportion of the total receipts of such tire dealers.

12. Again, it is impossible to give a full answer to this question because of the great variation among dealers. On the average, only an extremely small part of tire dealers' total receipts is derived from repairing or retreading customer-owned tires for other dealers. In fact, most tire dealers do not engage in this type of business at all. With

respect to repairing and retreading customer-owned tires for fleet operators, trucking firms, bus and taxi companies, or for other commercial, industrial, government and institutional customers, it is believed that in the case of a great majority of dealers only a very small part of their total receipts comes from such operations. Some dealers do not perform any tire repair or retread work. Many of those who do, confine such work to personal consumers. There are a few tire dealers, however, who do a substantial amount of repair and retread work for such commercial accounts, but it is believed that even these dealers receive at the most only around fifteen or twenty percent of their total receipts from such commercial retread work. Most dealers who are engaged in repairing and retreading do the greatest part of such work on customer-owned tires of personal consumers. In fact, as said before, many dealers confine their repair and retread operations to such work. Even here, however, the receipts from such work would in most cases represent a relatively small part of total receipts, since by far the greater part of receipts would be from the sale of new tires.

(13. This type of business is considered as retail business in the industry.)

14. Contract recapping is not a factor of any substance in the industry, but to the extent that it exists is considered a retail transaction.

(15. Sales by tire dealers of tires vulcanized, retreaded, or recapped by them and resold at retail have always been considered retail transactions, and establishments operated by such dealers have been historically recognized in the industry as retail establishments. In such a case the dealer customarily takes the used tire as a trade-in on a new tire, repairs it, and then resells it at retail. Since the

acquisition of the tire is a part of a retail transaction and the sale is also at retail, it would seem clear that the entire transaction should be considered one at the retail level.)

**DEFENDANT'S EXHIBIT D—WINSTON W. MARSH.**

July 30, 1954

Mr. Harry Weiss
Assistant Administrator
Wage & Hour & Public Contracts Division
United States Department of Labor
Washington 25, D. C.

Dear Mr. Weiss:

I am enclosing a memorandum which I have prepared in conjunction with our attorney and which I believe will demonstrate conclusively that sales to commercial accounts have at all times been recognized as retail sales in the tire industry.

I shall greatly appreciate the opportunity of talking with you after you have read this memorandum, to see if you desire any additional information or if there is anything further we may do.

Sincerely yours,

NATIONAL ASSOCIATION OF INDEPENDENT TIRE DEALERS, INC.,
W. W. MARSH,
Executive Secretary.

dl

enclosure

*Defendant's Exhibit D—Marsh*

**Memorandum by**
**The National Association of Independent Tire Dealers, Inc.,**
**on**
**What "Is Recognized as Retail Sales" in the Tire Industry.**

**Introduction.**

The purpose of this memorandum is to demonstrate that throughout the history of the tire industry sales to commercial accounts have been recognized in the industry as retail sales.)

The National Association of Independent Tire Dealers, Inc., believes that it is qualified to speak for the industry, at least for the independent tire dealers, in this respect. It is the sole national organization representing independent tire dealers, and has approximately 2500 members located in various cities and towns throughout the United States.

The problem in question is quite narrow. The pertinent statutory provision specifies, among other things, that retail sales and services are those which are "recognized as retail sales or services in the particular industry." Concerning this provision, the House Managers in their Conference Report stated:

> "Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and courts as a retail sale, so long as such sale or service is recognized in the particular industry as a retail sale or service."

It is thus clear that the "type of customer" makes no difference. The sole question is how the sales have been regarded in the industry—have they been treated as retail

sales, or as something else. We submit it is clear that in this industry sales to commercial accounts have consistently been regarded as retail sales.

In support of this view we point below to three types of evidence: the treatment of such sales in the NRA Codes; the treatment accorded such sales in OPA price schedules; and the manner in which the independent tire dealers themselves have treated such sales in their accounting records kept in the ordinary course of business.

## I.

### The NRA Codes for the Tire Industry Recognized Sales to All Users, Including Commercial Accounts as Retail Sales.

As is well known, the NRA codes were prepared by representative industry groups, and hence provide the best possible evidence of how the industry regarded sales to different classes of customers.

Article I A of Code No. 410, approved May 1, 1934, entitled "Code of Fair Competition for the Retail Rubber Tire and Battery Trade," provided in part as follows:*

> "Section 1. The term 'Retail Rubber Tire and Battery Trade' or 'Trade,' as used herein, shall mean the sale or offering for sale to the ultimate consumer and not for resale purposes, of:
>
> "(a) Solid or pneumatic rubber tires and pneumatic rubber tubes;
>
> * * * * * * *
>
> * * * * * * *

* This Code may be found in Codes of Fair Competition, Vol. IX, pp. 519, 524.

"(c) Tire or battery parts and accessories;

* * * * * * *

* * * * * * *

"(e) The servicing of products of the Trade."

* * * * * * *

* * * * * * *

"Section 4. The term 'service' or 'servicing' as used herein shall include, in addition to the direct servicing or repairing of products of the Trade, the rendering of any service to a customer as part of a transaction of sale or offer of sale of any product of the Trade to such customer, and the rebuilding of such products by the members of the Trade."

This proves conclusively that as early as 1934 the industry recognized retail sales as including all sales "to the ultimate consumer and not for resale purposes." Obviously, of course, sales to commercial accounts were included within this definition. Moreover, the rebuilding of tires for ultimate consumers was similarly treated as a retail service.

## II.

### The OPA Price Schedules for the Tire Industry Consistently Recognized All Sales for Use, Including Sales to Commercial Accounts, as Retail Sales.

The OPA price schedules were also prepared with the advice and assistance of members of the industry, and hence provide valid evidence of what the industry recognized as retail sales.

Price Schedule No. 63, relating to Retail Prices for New Rubber Tires and Tubes, issued by the Office of Price Ad-

ministration on December 30, 1941, provided in part as follows (7 Fed. Reg. 35, 36):

> "When used in this Schedule, the term . . . 'Sale at Retail' means any sale to a purchaser for use by such purchaser and not for resale."

This definition, or one similar to it, was continued throughout the history of OPA. Thus Revised Maximum Price Regulation 528, issued in 1945, the last Regulation containing a definition of retail sales for the tire industry, provided (10 Fed. Reg. 2726):

> " 'Retail Sale' means sale to a buyer for his own use and not for resale."

Similarly, OPA price regulations for wholesale sales recognized that in the tire industry all sales for use are treated as retail sales. Thus Maximum Price Regulation No. 143, relating to Wholesale Prices for New Rubber Tires and Tubes, issued by the Office of Price Administration on May 14, 1942, provided (7 Fed. Reg. 3664, 3666):

> " 'Sale at wholesale' means any sale, other than a sale to a vehicle manufacturer for original equipment of such vehicle, except a sale at retail.
>
> " 'Sale at retail' means any sale to a purchaser for use by such purchaser and not for resale."

Again, a similar definition was continued throughout the history of OPA (see 10 Fed. Reg. 10203, containing the last regulation relating to wholesale prices promulgated in full text).

(We believe that this is the best possible proof that the industry has consistently recognized retail sales as including all sales for use and not for resale. Sales to commercial accounts of course come within this definition.)

*Defendant's Exhibit D—Marsh*

III.

The Accounting Records Kept by Independent Tire Dealers in the Regular Course of Business Demonstrate That They Have Consistently Recognized Sales to Commercial Accounts as Retail Sales.

In obtaining information on this score it has, of course, been necessary to use a sampling procedure. The Association could not seek information from each of its approximately 2500 members. Nor could it use its Board of Directors for this purpose, since it has 56 members. Hence we decided to use the Executive Committee, which has 12 members located throughout the United States as follows: Montgomery, Alabama; Phoenix, Arizona; Oakland, California; Atlanta, Georgia; Chicago, Illinois; Worcester, Massachusetts; Henderson, North Carolina; Tulsa, Oklahoma; Portland, Oregon; Ardmore, Pennsylvania; Dallas, Texas; Aberdeen, Washington.

At a meeting of this Committee, held July 19-20, we asked each member to state his accounting practices with regard to classification of sales. Eleven of the members of the Committee reported that their accounting records classify all sales as either retail or wholesale. In the retail category, they include all sales to consumers, whether they be commercial users or individual users. In the wholesale category they include all sales for resale. These 11 members also stated that this practice has been uniformly followed by them for many years past.

The twelfth member stated that his accounting records broke sales down into three categories—retail, commercial, and wholesale. He added, however, that this was merely a matter of convenience to him, and that he had always considered sales to commercial accounts as retail sales, since they are sales to consumers.

We submit that this makes it clear beyond doubt that the independent tire dealers of the country have at all times recognized sales to commercial accounts as retail sales.

Because of the shortness of time between the July 19-20 meeting and the date of this submission, we have been unable to obtain samples of records from these 12 members verifying the statements made above. If the Administrator desires that we do so, however, we shall be happy to comply. Moreover, if the Administrator should think it necessary to have information from a wider group, we shall be glad to procure it.

Conclusion.

The NRA codes, the OPA price schedules, and the accounting practices of the independent tire dealers, all demonstrate unequivocally that the members of the tire industry have consistently, and long before the passage of the original Fair Labor Standards Act, regarded all sales to users, including sales to commercial accounts, as retail sales. Furthermore, as is well known, every state in the Union which has a retail sales tax applicable to tires applies that tax to sales to commercial accounts as retail sales. (We submit that all of the evidence taken together makes it clear beyond doubt that sales to commercial users are "recognized as retail sales or services in the particular industry," and should be accepted by the Administrator as conclusive.)

NATIONAL ASSOCIATION OF INDEPENDENT TIRE DEALERS, INC.,

By .....

W. W. MARSH,

Executive Secretary.

Dated: July 30, 1954.

**DEFENDANT'S EXHIBIT E—WINSTON W. MARSH.**

U. S. Department of Labor
Wage and Hour and Public Contracts Divisions
Washington 25, D. C.

Office of the
Administrator

Aug 9 1954

Mr. W. W. Marsh
Executive Secretary
National Association of Independent Tire
Dealers, Inc.
624 Wyatt Building
Washington 6, D. C.

Dear Mr. Marsh:

This will acknowledge and thank you for your recent memorandum report on the problem of retail sales recognition in the tire industry.

If upon completion of our analysis additional information or clarification is necessary, we shall take advantage of your offer of further assistance.

Very truly yours,

VERL E. ROBERTS,
VERL E. ROBERTS,
Acting Assistant Administrator.

## DEFENDANT'S EXHIBIT F—WINSTON W. MARSH.

Company A
Year 1953

Middle West
Medium-size community

| | Sales | Cost of Sales | | Gross Profit | % |
|---|---|---|---|---|---|
| New Pass. Tires | | | | | |
| Retail | 29,095.84 | 24,202.43 | | 4,893.41 | 16.8 |
| Wholesale | 7,444.95 | 7,286.42 | | 158.53 | 2.1 |
| New Truck Tires | | | | | |
| Retail | 34,034.38 | 28,075.77 | | 5,958.61 | 17.5 |
| Wholesale | 32,930.35 | 29,867.98 | | 3,062.37 | 9.3 |
| Used Tires | 7,672.68 | 3,470.07 | | 4,202.61 | 54.8 |
| Mechanical Goods | 7,907.73 | 6,837.94 | | 1,069.79 | 13.5 |
| Misc. Merchandise | 21,732.11 | 16,051.46 | | 5,680.65 | 26.1 |
| Misc. Sales | 1,187.58 | 1,013.79 | | 173.79 | 1.5 |
| Wheel Bal.—Alignment | 5,587.35 | 504.26 | | 5,083.09 | 91. |
| Service | 5,718.86 | ..... | | 5,718.86 | 100. |
| Paint | 13,468.07 | 9,772.79 | | 3,695.28 | 27.5 |
| | | | Total ..... | 39,696.99 | |
| Recapping Sales | 68,934.89 | 25,744.02 | | 43,190.87 | 62.4 |
| Recapping Expenses | | | | | |
| Labor | ..... | 12,011.23 | | | |
| Supplies | ..... | 144.66 | | | |
| (Est.) Depreciation | ..... | 2,500.00 | | | |
| Freight | ..... | 2,050.90 | | | |
| Payroll Taxes | ..... | 166.94 | | | |
| Repairs | ..... | 2,601.68 | | | |
| | | 19,475.41 | | | |
| Other Income | | | | | |
| Volume Bonus | ..... | ..... | 3,866.61 | | |
| Discount Earned | ..... | ..... | 1,694.55 | | |
| Adjusted Credit | ..... | ..... | 2,505.71 | | |
| Junk Misc. | ..... | ..... | 601.67 | | |
| | | | | 8,668.54 | |

[894] [Title omitted in printing.]

[895] [Minute entry of argument and submission—October 5, 1963, omitted in printing.]

[896] [File endorsement omitted.]

In the United States Court of Appeals for the Sixth Circuit

Nos. 15188–9

W. WILLARD WIRTZ, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT AND CROSS-APPELLEE

*v.*

STEEPLETON GENERAL TIRE COMPANY, INC. AND A. E. STEEPLETON, DEFENDANTS-APPELLEES AND CROSS-APPELLANTS

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

*Opinion—Decided April 27, 1964*

Before: WEICK, Chief Judge, KALBFLEISCH and PECK, District Judges

WEICK, Chief Judge: The two appeals present questions of coverage and exemption under the Fair Labor Standards Act, as amended. 29 U.S.C. § 201, et seq.

The action in the District Court was to enjoin the defendants from violating the minimum wage, overtime and record keeping provisions of the Act. It was conceded by defendants that they had not complied with the requirements of the Act, but they contended that it did not apply to their employees.

The District Judge heard the evidence and adopted findings of fact and conclusions of law. He held that the defendants' employees were engaged in commerce or in the production of goods for commerce within the meaning of the Act, and were covered by its provisions, but that their business was exempt from the requirements of the Act as a [897] "retail or service establishment" under Sections 13(a)(2) and 13(a)(4) of the

amended Act.[1] He dismissed the complaint. The Secretary of Labor appealed from the dismissal of his complaint. The defendants filed a cross-appeal from that part of the judgment which determined that they were engaged in interstate commerce and were covered by the Act.

[898] Steepleton General Tire Company, Inc., a Tennessee corporation, was engaged in the sale and distribution of tires and tubes in the Memphis, Tennessee area, which included parts of the adjoining states of Arkansas and Mississippi. It was a franchised dealer of The General Tire & Rubber Company, an Ohio corporation manufacturing tires, tubes and other products. Steepleton provided tire recapping and repair service in its place of business in Memphis. Its customers consisted of individuals, who purchased tires for their own personal use, and commercial users including industrial and transportation companies. Commercial accounts comprised over 50% of its business some of which purchased at discounts. Steepleton made sales to federal, state and local governments on competitive bidding. It made delivery of tires out of its inventory to national accounts sold by The General Tire & Rubber Company. In 1960, which was selected by the parties as a typical year, Steepleton's annual sales of tires amounted to about $903,520 of which $86,000 was to out of state customers and about $58,000 to customers for resale. Its salesmen made regular calls upon customers located in parts of Arkansas and Mississippi.

In our opinion, Steepleton was covered by the Act. Its employees handled, transported and worked on tires destined for these customers outside of Tennessee. The employees removed, recapped, repaired and mounted tires for use on vehicles

[1] Section 13(a) of the Amended Act exempts from the minimum wage and overtime requirements of the Act: "(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. * * * A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or * * * (4) any employee employed by an establishment which qualifies as an exempt establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells. * * *"

which operated in interstate commerce. Steepleton maintained accounting records with respect to its out of state sales. This was sufficient under the law to impose coverage. *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (CA 6).

There is left for our consideration only the question whether Steepleton was exempted from the requirements of the Act as a "retail or service establishment" under Section 13(a)(2) and 13(a)(4) of the amended Act.

It was the contention of Steepleton that the tire industry recognized only two classifications of sales. The sales to dealers who purchased for resale were claimed to be classified in the tire industry as wholesale. All other sales to ultimate consumers or users were recognized as retail irrespective of price, quantity, discounts, or commercial or industrial character. The Secretary, on the other hand, contended that the sales to commercial or industrial users were classified in the industry as wholesale sales. These included (1) sales and services to "fleet" accounts (customers operating five or more trucks or autos for business purposes at discount prices), (2) sales to national accounts and (3) sales made in competitive bidding to federal, state or local governments.

The Act, as originally passed in 1938, provided an exemption in Section 13(a) for "(2) any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1060, 1067, 29 U.S.C. § 213(a)(2).

The 1938 Act was construed by the Supreme Court to reach "employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 666. In order to be considered "retail sales," the sales or services had to be to an ultimate consumer for his personal use. No sales or services for business uses or purposes were considered retail. *Roland Electrical Co.* v. *Walling*, supra; *West Kentucky Coal Co.* v. *Walling*, supra. Under the 1938 Act, Steepleton's commercial sales would be considered as wholesale.

But Congress amended the Act in 1949. Footnote 1 herein sets forth the 1949 Amendment. The Conference Report was clear that "any sale or service, regardless of the type of customer, will have to be treated by the Admin- [899] istrator and the courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service." 95 Cong. Rec. 14,932, 2 U.S. Code, Congressional Service 2241, 2264 (1949). See also 95 Cong. Rec. 11,003–11,004. The Supreme Court, in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290 construed the amneded Act. Mr. Justice Harlan, who wrote the unanimous opinion of the Court, reviewed the legislative history of the 1949 amendment. He stated that it was the purpose of the amendment to reject the so-called "business use" test which had been adopted by the Administrator and approved by the Court in *Roland* "and to substitute a more flexible test, under which selling transactions would qualify as retail, if they (1) did not involve 'resale,' and (2) were recognized in the particular industry as retail." Id. p. 294.

The only question in this case, therefore, is whether the sale of tires to commercial users were recognized in the tire industry as retail. Most of the evidence offered in the District Court related to this issue.

A. E. Steepleton, president of the defendant company, had been in the tire business since 1938. He testified that sales for resale were recognized in the industry as wholesale whereas sales to the ultimate consumer were retail. Mr. Steepleton was corroborated by testimony of representatives of the four largest rubber companies in Akron—Goodyear, Firestone, Goodrich and General. These representatives of the "Big Four" related the customary practices and habits in the tire industry as far back as 1934 and they all agreed that the two part classification of tire sales in the industry was traditional. Where the sale was made to an ultimate consumer it was regarded as retail whether made to an individual for his personal use, to a business, industrial firm, trucking or bus company and irrespective of quantity, price or discounts.

Steepleton was further corroborated by the testimony of Winston W. Marsh, Executive Secretary and General Manager of National Tire Dealers and Retreaders Association which had a membership of 3200 tire dealers and Reuben E. Hedlund, Executive Secretary of the Chicago Tire Dealers Association

and editor and publisher of "This Week in Tires," a trade media.

Dr. Warren W. Leigh, who was Dean of the College of Business Administration of the University of Akron and Professor in business administration, testified as to his [900] familiarity with the sales practices in the tire industry. He confirmed the recognition in the tire industry of primarily "two classes—the wholesale which are sales for resale and consumer sales which they call retail."

The Secretary relied on the testimony of two college professors, one from Vanderbilt University and the other from University of Tennessee, and on classifications contained in Government publications such as the Standard Industrial Classification Manual and the Bureau of Census. Dr. Robert C. Brooks, Assistant Professor of Business Administration at Vanderbilt defined retail and wholesale sales as follows:

> "In the retail and wholesale trades, which are of course a very large part of the field of marketing, the term 'retail' is applied to those transactions where the motive of the purchaser in buying is his own personal enjoyment or satisfaction.
>
> "The term 'wholesale' includes all those transactions where the motive of the purchaser is to use the product in the conduct of his business for profit making purposes, or, if it is a non profit institution, he intends to use it for the furthering of the aims of his institution."

Dr. John R. Moore, who was professor of economics at the University of Tennessee defined retail sales "as sales to the ultimate consumer, not sales to anyone who might use the product. By ultimate consumer we generally mean the final business consumer—the person who uses the product for his own personal enjoyment. In connection with the sales—say, a sale to one who will incorporate that product in their own service, we don't regard those as retail sales.

"On the other hand, a wholesale sale would include certainly sales for resale, but would also include sales to industrial distributors, to—I should say, to consumers or professional users of the product."

These definitions, he testified, were in accord with the Standards Industrial Classification Manual definition of retailing and wholesaling and other authorities in the field of economics and marketing.

Although the definitions and classifications testified to by Doctors Brooks and Moore may have value theoretically [901] and academically and have been adopted in some industries, they do not conform to the practices as recognized in the tire industry. Doctors Brooks and Moore cited no authority from anyone connected with the tire industry in support of their definitions or classifications.

The Secretary also called as witnesses some commercial customers of Steepleton who regarded their purchasers of tires at discounts as wholesale purchases.

The Wage-Hour Administrator adopted an Interpretive Bulletin in 1959 which undertook to implement the exemption provisions under Section 13 of the amended Act as applied to the tire industry. The Bulletin classified as wholesale, sales for resale, sales made pursuant to a formal invitation to bid, sales to national accounts and sales at discounts to customers operating five or more motor vehicles.

This Bulletin did not have the force and effect of a regulation and was not controlling upon the court. While not binding on the courts, such bulletins "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134 at 140. See also *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 580 fn. 17.

Before the Bulletin was adopted and in an effort to assist the Wage-Hour Administrator in the formation of proper classifications of sales in the tire industry, the attorneys for the four major tire companies submitted to him a joint memorandum signed by them outlining the customs and practices and the two fold recognition of sales in the industry for more than 20 years. The attorneys conferred with representatives of the Administrator in Washington. Mr. Marsh also appeared before the Administrator and presented, orally and by written memoranda, the views of the National Tire Dealers and Retreaders Association with respect to the practices in the tire industry. These efforts turned out to be fruitless. Mr. Walter E. de Bruin, an attorney for Goodyear and Mr. Marsh both

testified that the Interpretive Bulletin adopted by the Ad-[902] ministrator did not conform to the recognition in the tire industry as to what constituted retail and wholesale sales, but merely continued the classifications adopted by the Administrator under the original Act prior to its amendment.

It is clear to us that commercial sales including "fleet sales," and sales to governmental agencies made on invitations to bid were all regarded in the tire industry as retail sales.

With respect to sales to national accounts, they were made by the tire manufacturer and not the dealer. The manufacturer fixed the price, billed the customer, and made the collections. The dealer did not even know the price for which the tires were sold to the national account. The dealer's sole function was to make delivery out of his inventory of the tires sold by the manufacturer to the national account, which inventory was later replenished by the manufacturer who paid the dealer a commission for his service based on the dealer's cost. Bookkeeping entries of charges and credits did not change the true nature of the transaction in which the dealer acted merely as delivery agent for the manufacturer.

The District Court ruled that the Interpretive Bulletin adopted by the Administrator did not conform to the customary habits and practices recognized in the tire industry. In our opinion, this was the only conclusion the court could properly reach from the overwhelming evidence in this case. These habits and practics in the tire industry were not of recent origin nor were they adopted to avoid the provisions of the Act, but were traditional and existed for many years before the amendment was enacted.

Irrespective of whether or not the Interpretive Bulletin was valid, the burden of proof still remained on Steepleton to prove that it came within the requirements of the exemption provisions of the Act. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388. The District Court followed the rule in *Arnold*.

We think the burden was met. It was for the District Court to determine from all the evidence whether Steepleton was a retail and service establishment and exempt from the requirements of the Act by reason of Sections 13(a)(2) and (4). The District Judge made the factual determinations. Upon review of the record as a whole we are not convinced that the District Judge made any mistake [903] in his findings of fact. In our judgment, they were not clearly erroneous. *United States* v.

*U.S. Gypsum Co.*, 333 U.S. 364, rehearing denied, 333 U.S. 869. His conclusions of law were correct.

The judgment in each case is affirmed.

[904] In the United States Court of Appeals for the Sixth Circuit

No. 15188

*Judgment—April 27, 1964*

Appeal from the United States District Court for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

(S) PAUL C. WEICK,
*Chief Judge.*

[905] In the United States Court of Appeals for the Sixth Circuit

No. 15189

*Judgment—April 27, 1964*

Appeal from the United States District Court for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

(S) PAUL C. WEICK,
*Chief Judge.*

[906] [Petition for rehearing covering 19 pages filed May 22, 1964, omitted from this print. It was denied, and nothing more by order. August 3, 1964.]

[924] In the United States Court of Appeals for the Sixth Circuit

15188–15189

*Order on Rehearing—Entered July 28, 1964*

A petition has been filed by W. Willard Wirtz, Secretary of Labor, United States Department of Labor, for a rehearing before the Court en banc of these cases which previously have been decided by a panel of three Judges.

Upon consideration it is ordered that the application for rehearing before the Court en banc be denied and that the petition to rehear be disposed of by the panel of the Court which heard the case on appeal.

(S) PAUL C. WEICK,
*Chief Judge.*

[925] In the United States Court of Appeals for the Sixth Circuit

15188–15189

*Order Denying Rehearing—August 3, 1964*

This cause came on to be heard on the petition for rehearing, and on consideration thereof, the Court finds that said petition is not well taken and the same is hereby overruled.

(S) PAUL C. WEICK,
*Chief Judge.*

[926] [Clerk's certificate to foregoing transcript omitted in printing.]

[927] Supreme Court of the United States

No. —, October Term, 1964

[Title omitted]

*Order Extending Time To File Petition for Writ of Certiorari—November 2, 1964*

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including December 1, 1964.

Potter Stewart,
POTTER STEWART,
*Associate Justice of the Supreme Court of the United States.*

Dated this 2d day of November, 1964.

[928] Supreme Court of the United States
No. —, October Term, 1964

[Title omitted]

*Order Extending Time to File Petition for Writ of Certiorari—November 30, 1964*

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including December 11, 1964.

Potter Stewart,
POTTER STEWART,
*Associate Justice of the Supreme Court of the United States.*

Dated this 30th day of November, 1964.

[929] Supreme Court of the United States

No. 755, October Term, 1964

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

*v.*

STEEPLETON GENERAL TIRE COMPANY, INC., ET AL.

*Order Allowing Certiorari—Filed March 1, 1965*

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

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# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

*v.*

STEEPLETON GENERAL TIRE COMPANY, INC., AND A. E. STEEPLETON

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered in this case on April 27, 1964.

### OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 32a–39a)[1] are unofficially reported in 15 WH Cases 582 and 45 Lab. Cases ¶ 31,315. The opinion of the court of appeals (App. 31–40) is reported at 330 F. 2d 804.

[1] "R." refers to the two-volume Joint Appendix printed for use in the court of appeals; "App.," to the appendix to this petition.

## JURISDICTION

The judgments of the court of appeals were entered on April 27, 1964 (App. 41–42). A timely petition for rehearing was denied on August 3, 1964 (App. 43). By orders of Mr. Justice Stewart dated November 2, 1964, and November 30, 1964, the time for filing a petition for certiorari was extended to December 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether respondent's sales of tires and tire services, at substantial discounts, to trucking companies, other operators of fleets of vehicles, and governmental agencies were "recognized as retail sales or services in the particular industry" within the meaning of § 13(a)(2) and (4) of the Fair Labor Standards Act, thereby entitling respondent to exemption as a "retail or service establishment" from the minimum-wage and overtime provisions of the Act.

## STATUTES INVOLVED

Sections 6, 7, and 13 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. (Supp. V) 206, 207 and 213) are set forth in pertinent part at pp. 29–30, *infra*.

## STATEMENT

This action was brought by the Secretary of Labor under § 17 of the Fair Labor Standards Act (29 U.S.C. 217) to restrain violations of the minimum wage, overtime, and record-keeping requirements of the Act (R. 8a, 18a). Respondent admitted that it had not complied with those requirements (R. 22a,

30a), but contended that its employees were not engaged in interstate activities within the Act's coverage, and that the business was an exempt "retail or service establishment" under §§ 13(a)(2) and 13(a)(4) of the Act (R. 13a–16a). The court of appeals, affirming the district court, held (1) that the employees were "engaged in commerce or in the production of goods for commerce" within the Act's coverage, but (2) that respondent's business was exempt as a "retail or service establishment." This petition is directed only to the latter question, which turns upon whether more than 75% of respondent's sales were "recognized as retail sales or services in the particular industry" within the meaning of § 13(a)(2).

1. Respondent Steepleton General Tire Company, Inc., ("Steepleton"),[2] a franchised dealer for General Tire & Rubber Company at Memphis, Tennessee, is engaged in selling, repairing and servicing tires in an area which includes neighboring parts of Tennessee, Arkansas, and Mississippi (R. 33a, 46a, 109a). During the period involved in this suit the company did a gross annual business of over $900,000, and employed about 47 employees (R. 28a, 33a), many of whom were regularly employed to make sales and deliveries of merchandise in interstate commerce; to recap tires for delivery out-of-State; and to remove, repair, recap and mount tires for commercial vehicles operated by customers in interstate commerce (R. 33a, Fdg. 4).

[2] The president of the corporation, A. E. Steepleton, was also joined as a defendant, but for simplicity we will refer to the corporation as the sole respondent.

More than half of Steepleton's dollar volume of business is derived from sales to customers operating multiple units, or "fleets", of commercial vehicles and to industrial enterprises such as construction contractors operating heavy earth-moving equipment in the construction of highways and river improvements (R. 76a, 77a, 109a–110a, 177a, 185a–186a, 247a–248a). While respondent offered no evidence of the percentage of its sales of tires and services to particular customers or specific types of customers, the record is clear that most, if not all, of the largest customers operate their vehicles substantially in interstate commerce.[3] For such large customers, respondent furnishes regular repair, replacement and inspection

[3] These customers include, for example, Gordon's Transport Company, a multi-state common carrier operating about 1,000 vehicles (R. 110a, 216a); Southwestern Transportation Company (probably Steepleton's largest customer, R. 75a), another interstate common carrier, at whose place of business Steepleton keeps an employee every day to handle the large volume of business for "those trucks [which] come in and out of there at all times of the day and night" (R. 79a, 109a–110a); White Rose Industrial Laundry, which operates a fleet of 75 trucks and cars, with at least 23 trucks operating regularly in interstate transportation (R. 166a–167a); Woody Herrin, a produce dealer, who regularly operated eight over-the-road refrigerated transport trucks traveling to practically every state in the Union (R. 177a) which were serviced two or three times a week by Steepleton's employees (R. 178a); Robilio and Cuneo, food products manufacturers operating several of its 23 vehicles in transporting their products to three other states (R. 181a); Klinke-Reed Dairy, three of whose trucks regularly traveled between Tennessee and Arkansas (R. 174a); A. S. Barbaro, a wholesale beer distributor regularly operating two over-the-road transport trucks which hauled beer from Belleville, Illinois, to Memphis (R. 213a); and Central States Dredging Company, which operated 14 vehicles including Mack dump trucks and pickups used in dredging and hauling supplies in five states (R. 185a–186a).

services, not only in its shop (which remains open 12 hours a day and provides round-the-clock emergency call service, R. 78a, 122a–123a, 234a), but also daily or weekly at the major customers' own places of business, adapting the services to the customers' special needs (R. 78a–79a, 109a–110a, see fn. 3, p. 4, *supra*). Seventy-five per cent of the respondents recapping and repair services, alone comprising 35% of its gross dollar volume of sales, is performed on tires for trucks or other heavy industrial equipment of its commercial customers. (R. 48a, 265a.)

2. Representatives of the tire industry (whose testimony was confirmed by respondent's expert witness, Dr. Leigh, R. 793a–795a) testified that it is the practice of large tire establishments (such as Steepleton) to divide their sales operations into three compartments—"a tire division selling at retail, a tire division selling commercially, and a tire division selling at wholesale" (R. 345a). The "retail" division typically makes over-the-counter sales of passenger tires in small quantities to individual purchasers for their personal use. The wholesale division handles sales to dealers for resale. And the third, or "commercial," division ordinarily specializes in the sale of truck tires, usually in large quantities, to trucking fleets, construction companies, airlines, or other commercial users. To solicit the commercial sales, such establishments employ a separate staff of "commercial," as distinguished from "retail," salesmen (*e.g.*, R. 51a, 105a–106a, 263a, 344a–345a, 401a–402a, 404a, 467a–469a, 440a, 453a–454a, 793a–795a). The executive director of the industry's trade association testified that the "series of discounts on commercial tires

and truck tires is different from the deals made on new passenger tires" (R. 345a). In a letter to the Wage-Hour Administrator, he explained that "the custom in the industry [is] to sell at a price which declines as the amount of tires purchased by a buyer increases," in accordance with a generally recognized scale of discounts (often recommended by the manufacturer) from the manufacturer's list prices, with the specified discount percentages differing for sales to commercial users, to the large fleets, and for national accounts (R. 870a–872a).[4] Such reductions are offered because of the advantages stemming from large-volume sales (R. 871a).

Also introduced in evidence was the Wage and Hour Administrator's Interpretive Bulletin classify-

[4] Marsh described the scale of discounts as follows (R. 871a):

> * * * Recommended discounts for truck tires to the commercial users are 10–10% [*i.e.*, 19%, the second 10% discount being based on the price remaining after the first] with a suggested 10–10–10% for the larger fleets and 10–10–10–10% where delivery is made to "national" accounts such as Swift & Co. operating motor vehicles in many places. (One larger tire manufacturer has a discount program of 10–10–10–5%, with an increase to as much as 10–10–10–10–10–5%, for the very large buyer; if the dealer sells at this latter discount, he can replace his stock from the manufacturer at a corresponding discount.) Technically, the independent tire dealer can refuse to deliver his merchandise to consumer purchasers at these discounted prices, but he makes such a decision with full knowledge that the company-owned store of one of the tire manufacturers will quickly take over the account and might even quote a larger discount.
>
> Again, many of our members sell tires in large quantities to trucking companies at a special discount from the list price, both the discount and the list price being suggested by the manufacturer.

ing sales in the tire trade (Pltf. Ex. 6; 29 C.F.R. 779.373). The Bulletin classified as other than "retail": (1) sales made pursuant to a formal invitation to bid, such as are typically made to government agencies; (2) sales made to "national accounts" (sales in which delivery is made by a local tire dealer under a centralized pricing arrangement between the customer's national office and the tire manufacturer); and (3) sales to "fleet accounts" (customers operating five or more vehicles) at prices equivalent to those charged on sales for resale.

3. The representatives of the tire industry further testified that the word "retail" was generally used in the tire industry to denote any sale not for resale, regardless of the kind or number of tires sold, the discounts given, the nature of the customer, or any other functional characteristic (*e.g.*, R. 235a, 288a–289a, 303a, 397a, 404a, 461a, 467a–468a, 656a–657a). It was testified, for example, that the quantity sale, or specialized retreading, of airplane tires for a commercial airline; the sale of thousand-pound "earthmover" tires to a construction company; or the sale, at a substantial discount, of 50 to 100 of the largest type truck tires to an interstate common carrier, would all be characterized as "retail" no less than the over-the-counter sale of a single passenger tire to an individual purchaser (R. 247a–249a, 258a–261a, 690a–692a). The use of the word "retail" as synonymous with "not for resale" was confirmed by Dr. Leigh, respondent's expert witness (R. 429a, 434a–458a), and accounting documents dating from 1934 showed that the usage was of long

standing in the industry. The only explanation offered for the industry's usage was that it conforms to the definition of "retail" found in most State sales tax statutes (including Tennessee's) and hence facilitates the computation and payment of the tax (R. 236a–239a, 248a–249a, 253a, 303a, 353a, 397a, 579a).[4a]

The record also shows frequent use in the industry of the term "retail" in various other senses—*e.g.*, in the distinction drawn by the same industry witnesses between the "retail" departments (over-the-counter sales of passenger-car tires) and the "commercial" departments (sales of truck tires to commercial users) of the larger establishments (see p. 5, *supra*).[5] Nevertheless, if it be relevant to any issue in the case, we do not here dispute that a lexicographer preparing a glossary of terms as used in the tire industry and applying a frequency-of-usage test would probably list "not for resale" as the first definition of the word.

4. The district court concluded as a matter of law that, in making the exemption turn on whether the sales were "recognized as retail sales or services in the particular industry" (§ 13(a)(2)), Congress intended "to give recognition to the particular industry's own classification of those sales which are by it considered to be retail sales under the Act" (R. 38a). Finding in turn that the word "retail" was used in

[4a] The first sales tax law was adopted in 1932 and 13 States followed suit in 1933 alone. Due, *The Nature and Structure of Sales Taxation*, 9 Vand. L. Rev. 123, 127. Thus none of the industry's accounting records introduced in evidence antedated sales taxation.

[5] See also the court of appeals acknowledgment that some of the commercial *customers* "regarded their purchases of tires at discounts as wholesale purchases" (App. 37).

the tire industry to denote any sale not for resale, regardless of any functional differentiations among the various classes of such sales,[6] the court held respondent to be exempt as a "retail and service establishment" under § 13(a)(2) and (4) (R. 39a).

The court of appeals affirmed, upholding the district court's finding of the industry's word usage as not clearly erroneous and by implication approving its interpretation of the statute. Although the court referred frequently to the industry's "practices," "customs," and "habits," the context in each case makes clear that it was referring only to the industry's linguistic practices and, like the district court, regarded any functional differentiation among classes of sales (in price, quantity, use, *etc.*) to be irrelevant.[7] While the court did not advert to the question of interpretation as such, its opinion as a whole thus makes clear that it, like the district court, interpreted "recognized as retail" as used in the statute to mean "labeled as retail" and nothing more.

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[6] "In the tire industry sales for resale are recognized to be wholesale sales. Whereas, sales of tires to consumers or users of same are recognized to be retail sales regardless of the character or identity of the purchaser, the use to which the tires may be put, the quantities purchased or the price paid for such tires." Finding 9, R. 34a; see also Finding 14, R. 36a.

[7] See, *e.g.*, its reliance on the testimony of the "Big Four" representatives who "related the customary practices and habits in the tire industry" as being that: "Where the sale was made to an ultimate consumer it was regarded as [*i.e.*, called] retail whether made to an individual for his personal use, to a business, industrial firm, trucking or bus company and irrespective of quantity, price or discounts" (App. 35–36). See also its reliance on the testimony of Dr. Leigh that the industry's "practice" was to "call" sales not for resale "retail" (App. 36).

REASONS FOR GRANTING THE WRIT

Section 13(a)(2) of the Fair Labor Standards Act exempts from the minimum wage and overtime provisions any "retail or service establishment" whose gross sales are less than $1,000,000.[8] A "retail or service establishment" is defined as any establishment 75% of whose annual dollar volume of sales "is not for resale and is recognized as retail sales or services in the particular industry." Respondent's sales of tires to other dealers for resale were less than 25% of its total sales, but its sales of tires and services to trucking companies, other "fleet" owners, and governmental agencies totalled far more than 25%. Respondent's exemption turns, therefore, upon whether the latter sales were "recognized as retail sales or services in the particular industry."[9] The answer to that question depends in turn upon the meaning to be given to the quoted phrase.

The courts below, in effect interpreting "recognized as retail" to mean merely "labeled as retail", held that the exemption turned solely on how the word "retail" was used by the members of the industry. We contend that the quoted phrase means "treated as retail" and that the exemption thus turns upon what

[8] The limitation of the "retail" exemption to establishments with gross sales under $1,000,000 (or under $250,000 if the establishment is part of a multi-establishment enterprise with sales over $1,000,000) was added by the 1961 amendments. See §§ 3 (s) and 13(a)(2)(i), 29 U.S.C. (Supp. V) 203(s), 213(a)(2)(i). Less than 1% of the tire dealers in the nation have sales exceeding that amount (see R. 338a).

[9] Respondent's "national account" sales, added to the sales for resale, would not by themselves exceed 25% of the total sales and are therefore not determinative of the exemption.

the industry does, not what it says. In applying the exemption, in our view, it is necessary first to determine what *Congress* meant by "retail"—in order to determine the class of goods and services the sale of which is within the "retail" concept—and then to determine whether the particular sale of such goods or services was treated in the industry "as" a "retail" or a "wholesale" sale, a question which in turn depends upon the quantity and price at which the sale was made.

The question thus posed—whether the exemption turns on what the industry actually does or merely on how it chooses to use the word "retail"—is one of fundamental importance in the administration of the Act. Industries engaged in selling goods or services to other industries, not for resale but for use by them in producing other goods and services, cover a wide spectrum of the American economy and employ hundreds of thousands of persons. But a few of the kinds of goods and services so sold are coal, oil, ice, business machines, and vending machines; manufacturing, transportation, construction, road-building, air conditioning, plumbing, heating, drilling, laboratory, bottling and printing equipment; and engineering, janitorial, accounting, advertising, printing, secretarial, investigative, warehousing, repair, guard, and investment counseling services. Given the necessary nexus to interstate commerce, the duty of any such establishment to comply with the wage-and-hour provisions of the Act will turn upon the application of the industry-recognition clause, and even now there are some 65 cases pending on the dockets of

the district courts involving that clause and its application to a diversity of businesses. While the ultimate application of the exemption will no doubt vary from industry to industry, the threshold question presented here is one that must be met and resolved in every case in which a "retail" exemption is claimed. Until that basic question has been resolved—*i.e.*, until it is settled whether the characterization is to be based on the words used in the industry or on the functional characteristics of the industry and of the sale—it is impossible even to begin to determine the proper application of the exemption to particular industries. The question presented in this case will thus affect virtually every business in the country selling goods or services to other businesses other than for resale. No more important question has arisen under the Fair Labor Standards Act, and it is plainly one warranting resolution by this Court.

## I

The court of appeals' interpretation of the statute as asking only how words are used in the industry deprives the statute of rational content, is contrary to the legislative history, and is in conflict with the meaning given the statute by the Fifth and First Circuits and by this Court.

1. The court of appeals' interpretation makes the statute virtually meaningless. By reading the statute as asking simply how the word "retail" happens to be used "in the particular industry," it would make the exemption turn on a will-o'-the-wisp, and in many instances upon a search for something that does not

exist. Words are typically used with many different meanings, not only by different persons but by the same persons for different purposes, and there is no necessary reason to suppose that the word "retail" would *have* a single identifiable meaning in a particular industry—being always used in only one, and the same, sense by all persons associated with the industry.

A related implication of interpreting "recognized as" to mean "labeled as" is that it would necessarily follow that any industry making sales not for resale could elect not to be subject to the Act. Businessmen are no less entitled than Humpty-Dumpty to make words mean what they want them to mean, and if the statute was indeed intended to turn solely on word usage, there is no reason why they should not take advantage of it and adopt whatever usage entitles them to the proffered benefit. And if that is so, the statute is reduced to the absurdity of saying that every industry selling goods not for resale "shall" pay minimum wages if, but only if, the industry is willing.[10]

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[10] The court of appeals' construction of the statute does more than offend good sense and the settled canon that exemptions from the Fair Labor Standards Act are to be narrowly construed (*e.g.*, *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295), for it also raises serious doubts about the constitutionality of the statute. The way in which persons in an industry choose to define and use a word has no rational relationship to any purpose to be served by the Fair Labor Standards Act. A rule requiring one employer but not another to pay minimum wages solely because they use different dictionaries would be arbitrary in the extreme and thus violate the Due Process clause.

2. The legislative history bearing on the significance of the industry's word usage is ambivalent. Much of the discussion in the debates reflects an assumption that there exists in each industry a meaningful concept of what is "retail", that it is "discoverable in any industry by honest search," and that Congress could avoid the difficult problems of definition by simply making the exemption turn upon a finding of what that concept is in each industry (95 Cong. Rec. 12502; see also *id.*, 12497, 12510, 12516, A4570). The only things about an industry that are "discoverable * * * by honest search," we submit—however hard and long the searcher looks—are (1) how words are used in the industry and (2) what is actually done in the industry. Either the decision must turn upon a *legal* characterization of the sales based on their functional characteristics (in which event the problems of legal definition cannot be avoided) or else it must turn upon word usage in the industry. There is no other choice, for the existence of a duty cannot rationally be made to turn upon a "finding" of something that does not exist. Thus, if Congress really meant to eliminate the necessity for a legal characterization of sales, and to make the exemption turn simply upon a finding of fact of what the industry's conception of a "retail" sale is, the statute can rationally be applied only in the manner in which it was applied below—*i.e.*, by the court becoming a lexicographer and merely recording how certain persons in an industry happen to use a word.

Yet if anything is clear, it is that Congress plainly did *not* wish that to be the result. Despite frequent

comments of the character noted above, each time Senator Holland, the sponsor of the amendment in the Senate, was pressed as to the implication of the statements he emphatically denied that the amendment was intended to "throw the situation wide open for each industry to determine whether its sales shall be considered retail" or to make controlling the interpretation "given to a 'retail sale' by a trade association" (95 Cong. Rec. 12501, 12510). The report of a majority of the Senate conferees confirmed those denials, expressly stating that it was not intended that "the views of trade associations * * * [or] the interpretation of any interested group should be regarded as controlling" and that the ultimate characterization was to be made by the Administrator and the courts on the basis of many factors, giving due weight "to the actual practice in the industry" (95 Cong. Rec. 14877). In short, prompted by the expressed fears of several Senators that just such an interpretation might be adopted, the authoritative spokesman for the legislation explicitly disavowed the very intent that has now been attributed to them by the court of appeals.

There is, no doubt, a logical inconsistency between those explicit disavowals that the industry's word usage was to be controlling and the statements previously noted. But a lapse in logic in congressional debates does not relieve the courts of the duty both to give a statute a rational content and to give it a content that will accomplish, as nearly as possible, the results that Congress wished accomplished. And not

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only does the court of appeals' interpretation of the statute as turning solely on word usage directly clash with the explicit disavowals of that intent but, as we will show in Point II, it will wholly fail to bring about the operative results Congress plainly meant to accomplish.

3. Although supported by a decision of the Fourth Circuit,[11] the view of the court below that the industry's word usage is controlling, and other factors irrelevant, is in conflict with the views of the Fifth and First Circuits. In *Mitchell* v. *City Ice Co.*, 273 F. 2d 560, a directed verdict that an establishment selling ice at a discount to shrimp-boat operators was exempt was set aside by the Fifth Circuit notwithstanding the unanimous testimony of industry members that "in their opinion sales of ice that were not for resale were retail sales" (pp. 561–562). Stating that "what is recognized *in* a particular industry to be retail can be proved objectively; proof is not restricted to the subjective test of what the members of industry think of it," the court held that consideration must be given to "all the circumstances surrounding the sales, including the great difference in price between the admittedly retail sales and the large or commercial sales" and that the "opinions" of industry members and expert witnesses were "to be weighed in light of their self-interest as well as the reasoning with which they supported them" (pp. 561–562).[12]

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[11] *Wirtz* v. *Modern Trashmoval, Inc.*, 323 F. 2d 451, certiorari denied, 377 U.S. 925.

[12] See also *Wirtz* v. *International Harvester Company*, 331 F. 2d 462, (C.A. 5), reversing a verdict for the employer on the

In *Aetna Finance Co.* v. *Mitchell,* 247 F. 2d 190, 193, the First Circuit similarly rejected, as inadequate, evidence of the industry's characterization of the small loan business as "retail financing", noting that "the sponsors of the amendatory legislation repeatedly disavowed an intention to permit each industry to decide for itself whether it was conducting a 'retail or service establishment' within the meaning of the exemption." See also *Durkin* v. *Casa Baldrich, Inc.,* 111 F. Supp. 71, 74 (D.C. P.R.), affirmed, 214 F. 2d 703 (C.A. 1).

4. The decision below is also in basic conflict, we believe, with this Court's decision in *Mitchell* v. *Kentucky Finance Co.,* 359 U.S. 290. In that case, the Court held that a small-loan business, although characterized as "retail" by the industry itself, was not eligible for the exemption. No part of the financial industry had ever been considered "retail" prior to 1949, and the Court concluded that it was not "intended by the amendment to broaden the fields of business enterprise to which the exemption would apply" but only to broaden the standard to be applied to particular sales by "business enterprises otherwise eligible under existing concepts to achieve exemption" (359 U.S. at 294). In so holding, the Court necessarily construed the statute as turning on something other than the industry's word usage; it was on

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ground that the trial court (a) had erroneously instructed the jury that the question was whether the sales were recognized as retail "by," rather than "in", the industry, and (b) had omitted from its instruction the fact that the sales to "fleet" operators were at a discount.

the meaning of the word "retail" as it was used by Congress, not as it was used by the industry, that the decision turned. Thus, despite the differing contexts in which the question arose, the decision below, interpreting the statute as turning solely on word usage, cannot, we submit, be reconciled with this Court's decision in *Kentucky Finance.*

## II

If the industry's own use of the word is not the touchstone of exemption, the ultimate characterization of a sale as "retail" or not necessarily becomes a question of law to be decided on the basis of the functional characteristics of the sale. The words of the statute provide little guidance as to which functional characteristics should be determinative, and to determine the meaning of the word "retail" as used by Congress, and hence the standards to be applied in making the characterization, resort must be had to the legislative history of the provision. Cf. *Mitchell* v. *Kentucky Finance Co., supra.* That history shows, at a minimum, (1) that the distribution of goods and services of a character sold primarily to businesses engaged in interstate commerce or in the production of goods for commerce is wholly outside the retail concept and (2) that, even if the sale is otherwise within the retail concept, sales at substantial quantity discounts must be characterized as "wholesale" rather than "retail."

1. Prior to 1949, § 13(a)(2), while similarly exempting any "retail or service establishment", did not define that term. In *Roland Co.* v. *Walling,* 326 U.S.

657, this Court construed the term "retail" as limited to sales of merchandise to private purchasers for personal or household use and as not including sales of goods or services to business enterprises for use by them in producing other goods and services. On the basis of that interpretation, the Court held that an enterprise engaged in selling and repairing electric motors for use by businesses in the production of goods for commerce was not exempt as a "retail" establishment.

The goods and services furnished by the Roland Company were in their nature of use only to businesses engaged in producing other goods or services, and its sales were therefore ordinarily made only to businesses. The definition of "retail" adopted by the Court was not in terms limited to that circumstance, however, and was taken by many as meaning that *any* sale to a business user was a non-retail sale, even if the item sold was one customarily sold for personal use and even though the sale was made at exactly the same price and under exactly the same conditions as were sales to private purchasers.

The primary purpose of the 1949 amendment, it seems clear, was to preclude making any such distinction among sales of goods and services sold on the same terms to both personal and business users. The "clarification" was needed, the House conferees said, "to obviate the sweeping ruling * * * that no sale of goods or services for business use is retail" (H. Conf. Rep., 95 Cong. Rec. 14931). Senator Holland, the sponsor of the amendment in the Senate, likewise emphasized that the amendment was aimed only at

the "dicta" in the *Roland* opinion and its extension to all "business sales, no matter how small they may be and no matter how they may happen, in spite of the fact that they are completely intrastate" (95 Cong. Rec. 12497). The purpose was to make clear "that a business sale does not necessarily have to be a non-retail sale" (*id.*, 12495) and thus "do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which, regardless of the size, and regardless of the fact that it is intrastate can never be held to be a retail sale under" the existing rulings (*id.*, 12498). What was objectionable about the existing interpretation was that, "if a housewife goes to a drygoods store to buy towels, that is a retail sale, but if the proprietor of a small hotel * * * goes into the same store, is served by the same clerk, buys the same number of towels, paying exactly the same price, under no circumstances can that sale be regarded as a retail sale, because it is for a business use" (*id.*, 12494). "Our amendment," Senator Holland said, "is confined to [an] effort to get away from" that "sort of silly, illusory, and ridiculous interpretation" (*id.*, 12494–12495).

Senator Holland emphasized that he was "talking about sales which are so small in size that they cannot in any sense be called wholesale or cannot in any sense be subject to discounts because of large size" (*id.*, 12495). He thought it "impossible to distinguish" between admittedly retail sales to private purchasers and "sales in small volume—which are recognized in an industry as retail—and sales to a local hotel or local laundry or to a local business building

or city hall or courthouse or any other business place, when the sale is a part of the normal, everyday retail business, assuming that the sale is not made in such quantity that discounts are allowed" (*id.*, 12501). He immediately added, however, that: "Of course, if it is [*i.e.*, sold at quantity discounts], it comes in the category of wholesale sales" (*ibid.*). In later submitting a list of questions and answers showing the application of the amendment, he again confirmed that view, stating that: "As a general rule, sales in quantities substantially larger than those to the average buyer and at a substantial discount are regarded as wholesale and not as retail" (*id.*, 12505).

Senator Holland also assured the Senate that the actual result in the *Roland* case would "[d]efinitely not" be affected by the amendment. Noting that the Roland Company was engaged in selling "industrial goods and service" to manufacturers and other industrial and business customers, he explained that: "The market for the type of equipment is of course extremely limited, and there has been no contention anywhere that one supplying that type of equipment is engaged in a retail business" (*id.*, 12505). Elsewhere, in similarly stating that the amendment's target was the "dicta" and not the holding in *Roland*, he explained that the Roland Company's business ("furnishing machinery and repairing and keeping up electrical equipment" for manufacturers) "involved services which, by their very nature, are not to be rendered to every Tom, Dick and Harry, but which are available only to and used only by large manufacturers" (*id.*, 12497). The reports of the con-

ferees confirmed Senator Holland's assurances, expressly noting that the amendment was not intended to "exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods" (H. Conf. Rep., 95 Cong. Rec. 14932) or to "change the status of * * * establishments selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment held nonexempt in *Roland* * * *)" (95 Cong. Rec. 14877 (statement of majority of Senate conferees)).

2. From the foregoing history it is apparent both that the 1949 amendment was not intended to overrule the actual holding of the *Roland* case and that it was primarily designed only to avoid the anomalous implication that sales of the same goods on the same terms to businesses and to private consumers would be treated differently. The limited purpose of the amendment, together with the explicit disavowal of any purpose to change the status of sales of "industrial goods" or of "manufacturing equipment," would suggest that the retail concept was still to be confined to the distribution of the kinds of goods and services that are normally purchased for private consumption as well as for business use and was not meant to be extended to the distribution of goods and services having *only* a business use and thus not sold "to every Tom, Dick, and Harry." That conclusion must, however, be qualified to take account of the repeated statements of the amendment's sponsors that the exemption would apply to farm-implement dealers and

to an automobile dealer notwithstanding that more than 25% of his gross income was from the sale of trucks "to the local butcher, baker, or grocer" (95 Cong. Rec. 12502; see also *id.*, 12496–12498, 11003). Since neither farm equipment nor trucks are generally sold for private use, the amendment to that extent seems to have been intended also to expand the "retail" concept to include the sale of at least some kinds of goods usable only for business purposes.

Whether the expansion of the class of "retail items"—*i.e.*, the kinds of goods or services the sale of which is within the retail concept—to include some items having only a business use was intended to go beyond the two kinds of items specifically mentioned (farm implements and trucks of the kind sold to local businesses) and, if so, to what extent is unclear. That question need not be resolved in this case, however, for it is plain in all events that the exemption was not to extend beyond sales to essentially "local" businesses.[13] If any effect at all is to be given to the repeated and explicit assurances that sales of "industrial goods" and of "manufacturing equipment" would continue to be non-retail, the very minimum distinction that must be drawn is that between items of a character sold generally to businesses engaged in a purely local business and those of a character sold primarily to businesses engaged in commerce or in the

[13] Technically, of course, farmers are engaged in producing goods for commerce. In view of the general exemption from the Act accorded to agriculture (§ 13(a)(6)), however, it is not surprising that Congress assimilated farmers to private consumers or to "local" businessmen rather than to industrial manufacturers.

production of goods for commerce. Whatever may be said of a relatively small delivery truck of the type that might be sold to a local bakery or grocery store, a truck tractor-and-trailer rig specifically designed for long-distance hauling and sold to a common carrier is surely as much of an "industrial" piece of equipment as were the electric motors sold and maintained by the Roland Company. And just as the sale of "manufacturing equipment" for use in producing goods for commerce is wholly outside the retail concept, so must be the sale of a highway transport to be used directly *in* commerce or, as here, of tires of a type and size suitable for use only on such a vehicle.

The relevance to the retail exemption of interstate commerce concepts derives from the intimate relationship of that exemption to the basic coverage of the Act. The retail exemption was originally conceived of by Congress, not as an "exception" serving some discrete policy, but as merely clarifying and confirming the basic purpose of the Act to reach only those persons engaged in commerce or in the production of goods for commerce. The close relationship of the questions was recognized by this Court in the *Roland* case, where the purpose of the retail exemption was explained as being to exempt those sales which occur "at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach" (326 U.S. at 666). It is perhaps not a great step to consider sales to "local" businesses not themselves

engaged in commerce or producing goods for commerce as sufficiently near the end of the "flow of goods in commerce" also to be exempted without doing violence to the basic policies of coverage. But to treat sales of machinery to manufacturers or of transportation equipment to interstate carriers also as exempt would be a sharp departure indeed from the basic purposes of the Act. Far from being at the "end" of the flow of goods in commerce, the function thus performed is prior to and supportive of activities which are themselves in commerce and subject to the Act.[14]

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[14] The relevance of the "interstate" or "local" character of the businesses served by the establishment to the policies underlying the "retail" exemption is reflected also in the special exemption for laundries (§ 13(a)(3)) that was added at the same time that the definition of "retail or service establishments" was adopted. That provision, thought to be necessary because there was no "retail concept" in the laundry business, is applicable only if more than 75% of the laundry's business is for "customers who are not engaged in a mining, manufacturing, transportation, or communications business" and was thus, on its face at least, cast in different terms from the definition of "retail" establishments. Yet Senator Holland explained the provision as being intended to give to laundries "the same relief from the Roland decision as the other retail and service establishments" and as involving "the same distinction * * * between work done for families and that done for the little village barbershop, beauty shop * * * or for any of the other purely local establishments" (95 Cong. Rec. 12503). The parallel seen between the two provisions by Senator Holland, who was the sponsor of both, obviously cannot exist if the "retail" concept was so expanded by the amendment as to include even sales of goods and services to, and specially adapted for use by, "mining, manufacturing, transportation, or communications" businesses.

In this case, while the record does not permit a precise breakdown, it is plain that many of the tires sold by respondent were of a size and type suitable only for use by, and in fact sold to, businesses engaged in commerce—*e.g.*, the large truck tires sold to common carriers for use on long-distance highway trucks carrying up to 30,000 pounds (R. 248a), and the huge "earthmover" tires used on heavy equipment engaged in highway or dam construction. The furnishing of the "wheels" for instrumentalities of commerce is no more a "retail" function, nor less a central link in the chain of commerce, than is the furnishing of manufacturing equipment to be used in the production of goods for commerce. Such a function had never previously been regarded as "retailing," and here, as in *Kentucky Finance*, the legislative history specifically disavowed any intent to change its status. The conclusion must be that the sale of such items, specifically adapted for use in industries engaged in commerce, is not within the "retail" concept.

3. The remaining tires sold by respondent—*e.g.*, passenger-car tires and tires sold to local businesses for use on delivery trucks—present a different question. The retail concept is admittedly applicable to such sales and the only question is whether the particular sales were "retail" or "wholesale." If that distinction is not to turn merely upon the way the industry chooses to define the words, it must depend upon the quantity and price at which the tires were sold. That those are the determining characteristics

is, moreover, confirmed by the history of the provision, particularly by Senator Holland's repeated statements that a sale "in such quantity that discounts are allowed" would "[o]f course" be "in the category of wholesale sales" (95 Cong. Rec. 12501) and that, "As a general rule, sales in quantities substantially larger than those to the average buyer and at a substantial discount are regarded as wholesale and not as retail" (*id.*, 12505).

In this case, the Administrator has adopted and published specific standards by which to determine when the discounts allowed on sales to owners of fleets of motor vehicles are sufficient to constitute a recognition that that class of sales, because of the nature of the customer and the potential or actual volume of its purchases, is unlike the normal over-the-counter sales to other customers. Those standards are well within those supported by the history of the Act and are, if anything, overly generous to tire dealers. Under those standards, in turn, more than 25 percent of respondent's sales would fail to qualify as "retail" (or at least the courts below, having based their decisions on another ground, have yet to find to the contrary).

## CONCLUSION

Because of the evident importance of the question, and secondarily because of the existing conflict of decisions, this petition for certiorari should be granted.

Respectfully submitted.

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DECEMBER 1964.

# APPENDIX A

## STATUTES INVOLVED

Sections 6, 7, and 13 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. (Supp. V) 206, 207, and 213) provide in relevant part as follows:

SEC. 6. MINIMUM WAGE

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1.15 an hour during the first two years from the effective date of the Fair Labor Standards Amendments of 1961, and not less than $1.25 an hour thereafter, except as otherwise provided in this section.

* * * * *

SEC. 7. MAXIMUM HOURS

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; * * *

* * * * *

SEC. 13. EXEMPTIONS

(a) The provisions of sections 6 and 7 shall not apply with respect to—

* * * * *

(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—

(i) is not in an enterprise described in section 3(s) [*i.e.*, an enterprise with gross sales exceeding $1,000,000], * * *

* * * * *

A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * *

* * * * *

(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *

* * * * *

# APPENDIX B

Nos. 15188–9

United States Court of Appeals for the Sixth Circuit

W. WILLARD WIRTZ, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT AND CROSS-APPELLEE

*v.*

STEEPLETON GENERAL TIRE COMPANY, INC. AND A. E. STEEPLETON, DEFENDANTS-APPELLEES AND CROSS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

Decided April 27, 1964

Before WEICK, Chief Judge, KALBFLEISCH and PECK, District Judges.

WEICK, Chief Judge: The two appeals present questions of coverage and exemption under the Fair Labor Standards Act, as amended. 29 U.S.C. § 201, et seq.

The action in the District Court was to enjoin the defendants from violating the minimum wage, overtime and record keeping provisions of the Act. It was conceded by defendants that they had not complied with the requirements of the Act, but they contended that it did not apply to their employees.

The District Judge heard the evidence and adopted findings of fact and conclusions of law. He held that the defendants' employees were engaged in commerce or in the production of goods for commerce within the meaning of the Act, and were covered by its provisions, but that their business was exempt from the requirements of the Act as a "retail or service establishment" under Sections 13(a)(2) and 13(a)(4) of the amended Act.[1] He dismissed the complaint. The Secretary of Labor appealed from the dismissal of his complaint. The defendants filed a cross-appeal from that part of the judgment which determined that they were engaged in interstate commerce and were covered by the Act.

Steepleton General Tire Company, Inc., a Tennessee corporation, was engaged in the sale and distribution of tires and tubes in the Memphis, Tennessee area, which included parts of the adjoining states of Arkansas and Mississippi. It was a franchised dealer of The General Tire & Rubber Company, an Ohio corporation manufacturing tires, tubes and other products. Steepleton provided tire recapping and repair

[1] Section 13(a) of the Amended Act exempts from the minimum wage and overtime requirements of the Act: "(2) any employee employed by any retail or serivce establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. * * * A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or * * * (4) any employee employed by an establishment which qualifies as an exempt establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells. * * *"

service in its place of business in Memphis. Its customers consisted of individuals, who purchased tires for their own personal use, and commercial users including industrial and transportation companies. Commercial accounts comprised over 50% of its business some of which purchased at discounts. Steepleton made sales to federal, state and local governments on competitive bidding. It made delivery of tires out of its inventory to national accounts sold by The General Tire & Rubber Company. In 1960, which was selected by the parties as a typical year, Steepleton's annual sales of tires amounted to about $903,520 of which $86,000 was to out of state customers and about $58,000 to customers for resale. Its salesmen made regular calls upon customers located in parts of Arkansas and Mississippi.

In our opinion, Steepleton was covered by the Act. Its employees handled, transported and worked on tires destined for these customers outside of Tennessee. The employees removed, recapped, repaired and mounted tires for use on vehicles which operated in interstate commerce. Steepleton maintained accounting records with respect to its out of state sales. This was sufficient under the law to impose coverage. *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (CA 6).

There is left for our consideration only the question whether Steepleton was exempted from the requirements of the Act as a "retail or service establishment" under Section 13(a)(2) and 13(a)(4) of the amended Act.

It was the contention of Steepleton that the tire industry recognized only two classifications of sales. The sales to dealers who purchased for resale were claimed to be classified in the tire industry as whole-

sale. All other sales to ultimate consumers or users were recognized as retail irrespective of price, quantity, discounts, or commercial or industrial character. The Secretary, on the other hand, contended that the sales to commercial or industrial users were classified in the industry as wholesale sales. These included (1) sales and services to "fleet" accounts (customers operating five or more trucks or autos for business purposes at discount prices), (2) sales to national accounts and (3) sales made in competitive bidding to federal, state or local governments.

The Act, as originally passed in 1938, provided an exemption in Section 13(a) for "(2) any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1060, 1067, 29 U. S. C. § 213 (a)(2).

The 1938 Act was construed by the Supreme Court to reach "employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." *Roland Electrical Co.* v. *Walling,* 326 U.S. 657, 666. In order to be considered "retail sales," the sales or services had to be to an ultimate consumer for his personal use. No sales or services for business uses or purposes were considered retail. *Roland Electrical Co.* v. *Walling, supra; West Kentucky Coal Co.* v. *Walling, supra.* Under the 1938 Act, Steepleton's commercial sales would be considered as wholesale.

But Congress amended the Act in 1949. Footnote 1 herein sets forth the 1949 Amendment. The Conference Report was clear that "any sale or service, regardless of the type of customer, will have to be

treated by the Administrator and the courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service." 95 Cong. Rec. 14,932, 2 U.S. Code, Congressional Service 2241, 2264 (1949). See also 95 Cong. Rec. 11,003–11,004. The Supreme Court, in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290 construed the amended Act. Mr. Justice Harlan, who wrote the unanimous opinion of the Court, reviewed the legislative history of the 1949 amendment. He stated that it was the purpose of the amendment to reject the so-called "business use" test which had been adopted by the Administrator and approved by the Court in *Roland* "and to substitute a more flexible test, under which selling transactions would qualify as retail, if they (1) did not involve 'resale,' and (2) were recognized in the particular industry as retail." Id. p. 294.

The only question in this case, therefore, is whether the sale of tires to commercial users were recognized in the tire industry as retail. Most of the evidence offered in the District Court related to this issue.

A. E. Steepleton, president of the defendant company, had been in the tire business since 1938. He testified that sales for resale were recognized in the industry as wholesale whereas sales to the ultimate consumer were retail. Mr. Steepleton was corroborated by testimony of representatives of the four largest rubber companies in Akron—Goodyear, Firestone, Goodrich and General. These representatives of the "Big Four" related the customary practices and habits in the tire industry as far back as 1934 and they all agreed that the two part classification of tire sales in the industry was traditional. Where the sale was made to an ultimate consumer it was regarded as retail whether made to an individual for his personal

use, to a business, industrial firm, trucking or bus company and irrespective of quantity, price or discounts.

Steepleton was further corroborated by the testimony of Winston W. Marsh, Executive Secretary and General Manager of National Tire Dealers and Retreaders Association which had a membership of 3200 tire dealers and Reuben E. Hedlund, Executive Secretary of the Chicago Tire Dealers Association and editor and publisher of "This Week in Tires," a trade media.

Dr. Warren W. Leigh, who was Dean of the College of Business Administration of the University of Akron and Professor in business administration, testified as to his familiarity with the sales practices in the tire industry. He confirmed the recognition in the tire industry of primarily "two classes—the wholesale which are sales for resale and consumer sales which they call retail."

The Secretary relied on the testimony of two college professors, one from Vanderbilt University and the other from University of Tennessee, and on classifications contained in Government publications such as the Standard Industrial Classification Manual and the Bureau of Census. Dr. Robert C. Brooks, Assistant Professor of Business Administration at Vanderbilt defined retail and wholesale sales as follows:

> "In the retail and wholesale trades, which are of course a very large part of the field of marketing, the term 'retail' is applied to those transactions where the motive of the purchaser in buying is his own personal enjoyment or satisfaction.
>
> "The term 'wholesale' includes all those transactions where the motive of the purchaser is to use the product in the conduct of his business for profit making purposes, or, if it is a

non profit institution, he intends to use it for the furthering of the aims of his institution."

Dr. John R. Moore, who was professor of economics at the University of Tennessee defined retail sales "as sales to the ultimate consumer, not sales to anyone who might use the product. By ultimate consumer we generally mean the final business consumer—the person who uses the product for his own personal enjoyment. In connection with the sales—say, a sale to one who will incorporate that product in their own service, we don't regard those as retail sales.

"On the other hand, a wholesale sale would include certainly sales for resale, but would also include sales to industrial distributors, to—I should say, to consumers or professional users of the product."

These definitions, he testified, were in accord with the Standard Industrial Classification Manual definition of retailing and wholesaling and other authorities in the field of economics and marketing.

Although the definitions and classifications testified to by Doctors Brooks and Moore may have value theoretically and academically and have been adopted in some industries, they do not conform to the practices as recognized in the tire industry. Doctors Brooks and Moore cited no authority from anyone connected with the tire industry in support of their definitions or classifications.

The Secretary also called as witnesses some commercial customers of Steepleton who regarded their purchases of tires at discounts as wholesale purchases.

The Wage-Hour Administrator adopted an Interpretive Bulletin in 1959 which undertook to implement the exemption provisions under Section 13 of the amended Act as applied to the tire industry.

The Bulletin classified as wholesale, sales for resale, sales made pursuant to a formal invitation to bid, sales to national accounts and sales at discounts to customers operating five or more motor vehicles.

This Bulletin did not have the force and effect of a regulation and was not controlling upon the court. While not binding on the courts, such bulletins "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134 at 140. See also *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 580 fn. 17.

Before the Bulletin was adopted and in an effort to assist the Wage-Hour Administrator in the formation of proper classifications of sales in the tire industry, the attorneys for the four major tire companies submitted to him a joint memorandum signed by them outlining the customs and practices and the two fold recognition of sales in the industry for more than 20 years. The attorneys conferred with representatives of the Administrator in Washington. Mr. Marsh also appeared before the Administrator and presented, orally and by written memoranda, the views of the National Tire Dealers and Retreaders Association with respect to the practices in the tire industry. These efforts turned out to be fruitless. Mr. Walter E. de Bruin, an attorney for Goodyear and Mr. Marsh both testified that the Interpretive Bulletin adopted by the Administrator did not con-

form to the recognition in the tire industry as to what constituted retail and wholesale sales, but merely continued the classifications adopted by the Administrator under the original Act prior to its amendment.

It is clear to us that commercial sales including "fleet sales," and sales to governmental agencies made on invitations to bid were all regarded in the tire industry as retail sales.

With respect to sales to national accounts, they were made by the tire manufacturer and not the dealer. The manufacturer fixed the price, billed the customer, and made the collections. The dealer did not even know the price for which the tires were sold to the national account. The dealer's sole function was to make delivery out of his inventory of the tires sold by the manufacturer to the national account, which inventory was later replenished by the manufacturer who paid the dealer a commission for his service based on the dealer's cost. Bookkeeping entries of charges and credits did not change the true nature of the transaction in which the dealer acted merely as delivery agent for the manufacturer.

The District Court ruled that the Interpretive Bulletin adopted by the Administrator did not conform to the customary habits and practices recognized in the tire industry. In our opinion, this was the only conclusion the court could properly reach from the overwhelming evidence in this case. These habits and practices in the tire industry were not of recent origin nor were they adopted to avoid the provisions of the Act, but were traditional and existed for many years before the amendment was enacted.

Irrespective of whether or not the Interpretive Bulletin was valid, the burden of proof still remained on Steepleton to prove that it came within the require-

ments of the exemption provisions of the Act. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388. The District Court followed the rule in *Arnold*.

We think the burden was met. It was for the District Court to determine from all the evidence whether Steepleton was a retail and service establishment and exempt from the requirements of the Act by reason of Sections 13(a) (2) and (4). The District Judge made the factual determinations. Upon review of the record as a whole we are not convinced that the District Judge made any mistake in his findings of fact. In our judgment, they were not clearly erroneous. *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, rehearing denied, 333 U.S. 869. His conclusions of law were correct.

The judgment in each case is affirmed.

United States Court of Appeals for the Sixth Circuit

No. 15188

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT

*vs.*

STEEPLETON GENERAL TIRE COMPANY, INC., AND A. E. STEEPLETON, DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

(Filed April 27, 1964)

Before WEICK, Chief Judge, KALBFLEISCH and PECK, District Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

PAUL C. WEICK,
*Chief Judge.*

Costs: None.

United States Court of Appeals for the Sixth Circuit

No. 15189

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-CROSS APPELLEE

*vs.*

STEEPLETON GENERAL TIRE COMPANY, INC. AND A. E. STEEPLETON, DEFENDANTS-CROSS APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

(Filed April 27, 1964. Carl W. Reuss, Clerk.)

Before WEICK, Chief Judge, KALBFLEISCH and PECK, District Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

PAUL C. WEICK,
*Chief Judge.*

Costs: None.

United States Court of Appeals for the Sixth Circuit

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Nos. 15188–9

W. WILLARD WIRTZ, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT AND CROSS-APPELLEE

*v.*

STEEPLETON GENERAL TIRE COMPANY, INC. AND A. E. STEEPLETON, DEFENDANTS-APPELLEES AND CROSS-APPELLANTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

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(Filed August 3, 1964. Carl W. Reuss, Clerk)

ORDER

Before WEICK, Chief Judge, KAEBFLEISCH and PECK, District Judges.

This cause came on to be heard on the petition for rehearing, and on consideration thereof, the Court finds that said petition is not well taken and the same is hereby overruled.

/s/ PAUL C. WEICK,
*Chief Judge.*



U.S. GOVERNMENT PRINTING OFFICE: 1964

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No. 755.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

W. WILLARD WIRTZ, Secretary of Labor,

v.

STEEPLETON GENERAL TIRE COMPANY, INC., and A. E. STEEPLETON.

## REPLY BRIEF.

### STATEMENT OF THE CASE.

The numbered sections of the "Statement" in the petition for a writ of certiorari, particularly the last of those sections, are argumentative. That "Statement" omits facts which the district court and court of appeals considered determinative in this case. That "Statement" ascribes inaccurate and unwarranted implications to the opinions of both lower courts and by use of ingenious semantic leger-de-main misconstrues those opinions.

The facts of this case are accurately stated in the findings of fact by the district court (R. 32a-37a). The determinative testimony in this case is succinctly paraphrased in the opinion of the court of appeals, 330 F. 2d

804, based upon an obviously diligent and exhaustive study of the entire, lengthy record.

The issue in this case is whether or not petitioner can obtain judicial approval of theoretical, text-book classifications of sales despite Congressional rejection of such academic criteria for sales and despite Congressional enactment of the recognition in the particular industry as the test made mandatory upon petitioner.

## REASONS FOR DENYING THE WRIT.

**The "clearly erroneous" rule.**

Rule 52 (a) of the Federal Rules of Civil Procedure provides that findings of fact in cases tried as was the case at bar shall not be set aside unless "clearly erroneous". This rule becomes emphatic where such findings are inferences drawn from documents or from undisputed facts, **United States v. United States Gypsum Co.**, 333 U. S. 364, 394; **Commissioner v. Duberstein**, 363 U. S. 278, 291. This rule is applicable whenever such findings are adequately supported by the record, **Graver Tank and Mfg. Co. v. Linde Air Products Co.**, 339 U. S. 605, 612.

The only issue raised by the petition for a writ of certiorari in this case is the classification of retail sales as recognized in the tire industry. This is a question of fact. Senator Taft was one of the sponsors of the 1949 amendment which clarified the exemption of retailers from Fair Labor Standards Act coverage (Section 13 (a) (2) of said Act). Senator Taft described the "recognized in the particular industry" test, made mandatory upon the Wage-Hour Administrator by the 1949 amendment, as "a question of fact just as much as any other question of fact" (95 Cong. Rec. 12516).

The district court found as a fact in this case that the only sales recognized to be wholesale sales in the tire industry are sales for resale (R. 34a). The overwhelming

support in this record for this finding is indicated by the concession on page 8 of the petition for a writ of certiorari that the fundamental definition of the word "retail" as used in the tire industry is "not for resale".

The district court found as a fact in this case that sales of tires to consumers or users are recognized in the tire industry to be retail sales without regard for the use made of the tires, the quantity purchased or the price paid (R. 34a). The court of appeals, in affirming the judgment of the district court, held that the District Judge had not "made any mistake in his findings of fact", 330 F. 2d 809. The court of appeals after its exhaustive analysis of the testimony in this case held specifically that commercial or "fleet sales" and sales to governmental agencies are recognized in tire industry to be retail sales (Ibid). Testimony evidencing the recognition of retail sales in general and of "fleet sales" or commercial sales and sales to governmental agencies in the tire industry to be retail sales paraphrased or alluded to in its opinion in this case by the court of appeals may be found in the record as follows:

A. E. Steepleton, respondent R. 117a, 118a;

E. A. Hinderscheid (Firestone Tire & Rubber Co.), R. 611a, 625a, 641a;

Milan Zaveson (General Tire & Rubber Co.), R. 497a-498a;

Ted Curry (B. F. Goodrich Co.), R. 467a, 468a, 487a;

Raymond L. Davis (Goodyear Tire and Rubber Co.), R. 568a-570a, 576a;

W. W. Marsh (National Tire Dealers and Retailers Ass'n), R. 303a, 320a-324a, 353a, 872a, 878a, 887a, 889a;

Reuben E. Hedlund (Chicago Tire Dealers Ass'n; trade media publisher and writer), R. 656a-657a, 688a, 689a;

Dr. Warren W. Leigh (Dean, College of Bus. Admin., Akron Univ.), R. 428a, 429a, 434a, 459a;

Walter E. de Bruin (Counsel, Goodyear Tire & Rubber Co.), R. 281a, 289a;

Joint memo by "Big 4". Tire Companies—R. 850a, 854a-855a.

Additional testimony from one of respondents' long-time competitors is to the same effect (R. 397a, 398a, 403a), as is the testimony by a District Manager for General Tire & Rubber Company familiar with respondents' business and market (R. 414a).

The testimony by the above-mentioned witnesses as to what is recognized in the tire industry to be retail and wholesale sales was not and could not have been contradicted by either of the two college professors called by petitioner as expert witnesses in this case. As the court of appeals observed, 330 F. 2d 808, neither of petitioner's college professors cited any authority from anyone connected with the tire industry in support of the sales classification advanced by petitioner. Both of petitioner's experts advocated the sales classification that would under academic theory apply to any and all industries (R. 710a, 752a), thereby giving no effect or meaning to the statutory phrase, "as recognized in the **particular** industry" (emphasis added).

The district court's finding that all sales to users or consumers are recognized in the tire industry to be retail sales is based upon the view unanimously expressed by every witness in this case who had any experience in the tire industry. Respondents were not required to show unanimity of opinion among persons in and as well among persons who had some contacts with the tire industry to carry their burden of proof under the retail exemption; a preponderance of the whole evidence that the prescribed portion of respondents' sales were recog-

nized in the tire industry to be retail sales was sufficient. **Boisseau v. Mitchell,** 218 F. 2d 734, 739. Since the district court's classification of retail sales as recognized in the tire industry is drawn from the uncontradicted testimony about such recognition as unanimously stated by all witnesses qualified to testify to such fact who appeared in this case, that finding should not be reviewed under Rule 52 (a) of the Federal Rules of Civil Procedure, **United States v. United States Gypsum Co.,** *supra*; **Commissioner v. Duberstein,** *supra.*

**No conflict between Circuits or with a decision of this Court.**

The only question presented by the petition for a writ of certiorari herein is whether certain sales by the corporate respondent are recognized as retail sales in the tire industry. As the petition fully develops, the relief petitioner seeks in this case is approval of petitioner's stubborn insistence upon use of theoretical, academic or governmental definitions of retail sales supporting the "business use" test to prove what is "recognized as retail sales in the particular industry," as that phrase appears in the 1949 amendment to § 13 (a) (2) of the Fair Labor Standards Act. In the case at bar petitioner evidenced that stubborn insistence upon the well-known "business use" test as stated in the following academic or governmental definitions of "retail sales":

Petitioner's expert, Prof. Brooks:

> "Retail" for all "the retail and wholesale trades, which are of course a very large part of the field of marketing", means "those transactions where the motive of the purchaser is buying in his own personal enjoyment or satisfaction" (R. 700a).

Petitioner's expert, Prof. Moore:

> "Retail" . . . "as used by leading authorities in the fields of economics and marketing" (R. 735a),

among which are, "any of the standard texts in the field of marketing . . . the Marketing Handbook . . . the Standard Industrial Classification Manual" (R. 737a), means "sales to the ultimate consumer, not sales to anyone who might use the product," and "ultimate consumer" means, "the person who uses the product for his own personal enjoyment" (Ibid.).

Chief Judge Weick in his opinion for the Sixth Circuit Court of Appeals in this case noted that petitioner's two professors, Doctors Brooks and Moore, "cited no authority from anyone connected with the tire industry in support of their definitions or classifications" (330 F. 2d 808).

Petitioner's third expert was a Labor Department administrative analyst concerned with research and statistics (R. 763a). She helped create the sales definitions and classifications which petitioner seeks to impose upon the tire industry (R. 771a, 772a) by reference to "analogous areas of marketing" such as "the automobile industry—automobile trade, I mean, and the marketing of parts and accessories, batteries and so forth" (R. 776a) rather than recognition in the "particular" tire industry. Sales definitions or classifications offered by this research statistician and the sources cited as authority for same include:

The Bureau of the Budget's Standard Industrial Classification Manual, used to classify businesses when data about same is compiled for analytical comparisons in governmental or other statistical studies (R. 765a-766a), which defines "retail trade" to mean, inter alia, businesses "engaged in selling merchandise for personal, household, or farm consumption" (R. 767a).

1958 Census of Business, published by the Bureau of Census, which uses the above Standard Industrial Classification Manual definition (R. 769a).

Definitions of "retail" and "ultimate consumer" from various government sources (R. 770a) and from

encyclopedia or from text books in the field of marketing by Beckman and many other academics (R. 806a-817a). As emphasized in this record by petitioner these sources were selected from the writings of theorists or doctrinaires which follow and adopt the "concept of retailing" by which "**a retail sales is one in which the buyer is an ultimate consumer** . . . (whose) **motive is personal or family satisfaction stemming from the final consumption of the article being purchased** . . ." (R. 811a, 813a).

Petitioner argues that the refusal of the Sixth Circuit in this case to acquiesce in petitioner's stubborn insistence upon the "business use" test to classify retail sales conflicts with the decision of this Court in **Mitchell v. Kentucky Finance Co.**, 359 U. S. 290, with decisions by the First Circuit in **Aetna Finance Co. v. Mitchell**, 247 F. 2d 190, and **Durkin v. Casa Baldrich, Inc.**, 214 F. 2d 703, and with the Fifth Circuit decision in **Mitchell v. City Ice Co.**, 273 F. 2d 560. Examination of those cases reveals that none of same affirmatively decides the only question presented by the petition: how shall the recognition of certain sales as retail sales in a particular industry be adduced in evidence.

As a negative point of law, this Court's decision in the **Kentucky Finance Co.** case, *supra*, prohibits the petitioner's continued insistence upon the "business use" test in this case and other administration of § 13 (a) (2). As there explained, the "business use" test restricted the meaning of retail sales to include only sales "to private persons to satisfy their personal wants" (359 U. S. 293). As there held, a dissatisfied Congress, over the Administrator's objection, in 1949 did away with that restricted definition of retail and amended § 13 (a) (2) so that a transaction would qualify as retail if it did not involve resale and was recognized in the particular industry as retail (Ibid.). In disregard of and contrary to this

Court's ruling in **Kentucky Finance Co.** and other cases that Congress in 1949 forbid use of the "business use" test, the testimony by petitioner's experts referenced above plainly shows his continuing insistence upon definitions which restrict retail sales to those motivated by the purchaser's personal or family enjoyment or satisfaction. This Court and every Circuit has or would rule without conflict that petitioner may not properly adopt or apply that definition of retail sale under § 13 (a) (2) of the Fair Labor Standards Act.

Two of the cases said by petitioner to be in conflict with the Sixth Circuit's decision in this case make no ruling at all as to the source or character of evidence which shall show whether certain sales are recognized to be retail sales in a particular industry. One of these is **Durkin v. Casa Baldrich, Inc.**, *supra*. In that case the First Circuit merely noted that, whatever proof of the recognition in the particular industry may have offered, it was "far from convincing one way or another" (214 F. 2d 708), thus the First Circuit under the clearly erroneous rule refrained from reversing the trial court's finding of fact as to the recognition in the particular industry. The second of these is this Court's **Kentucky Finance Co.** decision. The above-described rule that petitioner cannot properly apply the "business use" test in a § 13 (a) (2) case, as is attempted in the case at bar, is found in that case, but no where in that case does any rule appear which would preclude proof of the recognition in a particular industry by testimony from persons having long and varied experience in the particular industry and by documents showing the implementation in the particular industry of the recognition asserted by such persons during a long period before the 1949 amendment of § 13 (a) (2).

This Court granted certiorari in **Mitchell v. Kentucky Finance Co.**, *supra*, to resolve the conflict between the Sixth Circuit's decision therein and the First Circuit's de-

cision in **Aetna Finance Co. v. Mitchell,** *supra* (359 U. S. 291). This conflict involved the "retail concept" principle which determines whether a business can qualify for exemption under § 13 (a) (2), not how a business like respondents', which does qualify, shall prove how its sales are recognized in its particular industry. Since the "retail concept" was the issue, this Court's opinion in the **Kentucky Finance Co.** case does not mention the source or probative value of whatever testimony may have therein been offered as to the recognition of this finance company's transactions in its particular industry. This Court reviewed pertinent aspects of the legislative history of the 1949 amendments of § 13 (a) (2) and concluded that exemption under that section was restricted to those businesses which qualified as retailers under "existing concepts" (359 U. S. 294). The Conference Report on the 1949 amendment is quoted in the opinion (359 U. S. 295) as designating credit companies to be one of the businesses outside the "retail concept". Based upon the "retail concept", issue this Court in the **Kentucky Finance Co.** case stated a distinction between the rights of businesses which could and businesses which could not qualify for exemption under § 13 (a) (2) in phraseology which has direct application in the case at bar. Under this distinction such businesses as respondents' tire store, which qualified as retailers under existing concepts in 1949, were entitled to prove their exemption under § 13 (a) (2) by showing the many classes of persons with which they dealt and by showing that they were thought of in their particular industry as engaged in retail business. This right to make this showing, as respondents did in the case at bar, is implicit in this Court's ruling that finance companies, among other businesses outside the retail concept, would not accomplish anything by making the same showing:

"Thus enterprises in the financial field, none of which had previously been considered to qualify for the exemp-

tion regardless of the class of persons with which they dealt, and **regardless of whether they were thought of in the financial industry as engaged in 'retail financing'**, remained unaffected by the amendment of § 13 (a) (2)" (Emphasis added). 359 U. S. 294-295.

As emphasized above, evidence showing how finance companies of a given sort "were thought of" in the financial industry was disregarded by this Court in the **Kentucky Finance Co.** case. In the case at bar the only issue posed for this Court concerns the source and other qualitative criteria for testimony showing how respondents' business and its sales are "thought of" in its particular industry. The record in the case at bar clearly and without contradiction shows that Steepleton General Tire Company is "thought of" in the tire industry as engaged in the retailing of tires; it is equally clear and similarly uncontradicted that substantially more than 75% of Steepleton General Tire Company's sales are "thought of" in the tire industry as retail sales. The proof that this is how certain sales are "thought of" in the tire industry is so overwhelming that petitioner's leading counsel at the trial of this case volunteered "There is really no issue about what the industry's position is, Your Honor" (R. 282a), and the petition in this Court at page 8 concedes the same thing according to the usage, if not the thoughts, in the tire industry. In this case petitioner seeks to have this Court ignore that recognition in this particular industry in favor of the "business use" test as found in text books or other academic sources which petitioner would uniformly apply to all industries.

The **Aetna Finance Co.** decision by the First Circuit, like this Court's decision in the **Kentucky Finance Co.** case, turns upon the same designation of "credit companies" by the Conference Report on the 1949 amendments

to § 13 (a) (2) as outside the retail concept and as well upon the weakness of the defendant's proof of the exempt status it claimed. It should be noted that the defendant in the **Aetna Finance Co.** case claimed it was exempt as a service, not as a retail establishment. The First Circuit held that the showing by the defendant that there was "some disposition" in the small loan industry to refer to small loans to individuals as "retail financing", was hardly relevant to the intended meaning of the term "service establishment" and was, in any event, contradicted by an apparently qualified government expert (274 F. 2d 193). Nowhere in this opinion does the First Circuit hold that witnesses with long experience in a given industry are not qualified to testify what sales had been recognized in that industry to be retail sales during a period commencing long before the 1949 amendment to § 13 (a) (2), as such experienced tire industry personnel did in the case at bar. Since the **Aetna Finance Co.** case determined only the defendant finance company's right to exemption as a **service** establishment, the opinion therein does not mention, much less decide or set qualitative standards governing proof of the recognition of certain sales as retail sales in a given industry by a respondent claiming exemption as a retail establishment in such industry.

The decision of the Fifth Circuit in **Mitchell v. City Ice Co.**, *supra*, is similarly extraneous to the single issue in the case at bar. In the trial court a judgment had been rendered on directed verdict for the defendant, City Ice Company; the trial court had refused to admit an Interpretative Bulletin prepared by the Wage-Hour Administrator as evidence of what is considered in the industry to be retail. On appeal by the Secretary of Labor, the appellee Ice Company not being represented by counsel before the Fifth Circuit, the trial court's exclusion of the Interpretative Bulletin was sustained. The testimony

reviewed and commented upon by the Fifth Circuit in this case included that from four industry witnesses, who supported the Ice Company's contention, and testimony from a government expert, who on cross-examination accepted a trade association publication as authoritative, although contrary to the opinion this expert had given on direct examination. The Fifth Circuit held that this case should not have been taken from the jury, that the weight to be given opinions expressed by various witnesses, including the government expert's "weakened" opinion, and the other circumstances surrounding the sales by the Ice Company constituted issues for the jury.

In the **City Ice Co.** decision the Fifth Circuit does not overrule, but expressly cites its decision in **Boisseau v. Mitchell,** 218 F. 2d 734, as expressing the view of the Fifth Circuit upon proof of what is recognized in a particular industry to be retail. In the **Boisseau** case the trial court held that the defendant had not sustained his burden of proving that his sales or services were regarded as retail in his particular industry (218 F. 2d 736); the trial court rendered judgment against defendant. The Fifth Circuit reversed after a careful review of the testimony bearing upon the recognition in the particular industry test. The government in **Boisseau** relied upon a marketing professor who testified to sales classifications taken from the Department of Commerce Census of Business, the Bureau of the Budget's Standard Industrial Classification Manual and other sources which restrict the definition of "retail" sales to mean only those "made to the ultimate consumer for personal or family use". The Fifth Circuit rejected all of same because, as it stated:

> "This, of course, is precisely the concept which Congress repudiated in passing the 1949 amendment."
>
> 218 F. 2d 738.

In contrast to the rejected "business use" test offered by the Government's marketing professor, the defendant

Boisseau offered testimony by an economics professor to show the inapplicability of theoretical classifications to the actual circumstances of defendant's business, testimony from two of defendant's competitors and from a salesman for a supplier who sold to the defendant. All witnesses for the defendant Boisseau apparently followed what the Fifth Circuit terms the general retail concept under which retail sales are "sales or services made directly to the consumer and not for resale" and under which a business is classified as retail "because of its relationship to other businesses and the people it serves" (218 F. 2d 739). This testimony in the **Boisseau** case meets exactly the same qualitative standards as does the testimony by Dr. Leigh and all the tire industry personnel in the case at bar, although the quantum of proof in the case at bar is much greater and the recognition in the tire industry, as evidenced by accounting forms, regulatory agency rulings and other documents, is shown to have continued without change from a much earlier date. In **Boisseau** the Fifth Circuit held this proof ample to carry the defendant's burden under the § 13 (a) (2) retail exemption. There is no conflict between the Fifth Circuit's reversal of the trial court in **Boisseau** and the Sixth Circuit's affirming the trial court in the case at bar on more extensive and better documented proof of the same sort. The Fifth Circuit in **Boisseau**, as expressly relied upon in its **City Ice Co.** decision, held, as the Sixth Circuit held in the case at bar, that the recognition in the particular industry test may not be implemented or administered by reference to the Census of Business, the Standard Industrial Classification Manual or the other theoretical sources relied upon by petitioner in the case at bar because those sources all state the "business use" test rejected by Congress in 1949. Nowhere in its recent decision in **Wirtz v. International Harvester Company**, 331 F. 2d 462, does the Fifth Circuit expressly or by implication reverse its acceptance of proof of recognition in a particular industry by testimony from

personnel in that industry, as it did in **Boisseau,** *supra,* and repeated by reference in the **City Ice Co.** case, *supra.* In this recent decision by the Fifth Circuit there was no occasion to rule upon qualitative characteristics, probative value or any other aspect of the testimony. The special interrogatory submitted to the jury was held to lack essential ingredients of the cause of action, constituting basic, plain and clear error requiring reversal (331 F. 2d 466). On the difference between the phrase "in the industry" and "by the industry", the Fifth Circuit noted that there is a difference (ibid), but that difference had apparently been ignored by the Secretary of Labor when his requested instruction to the jury in this case was prepared (331 F. 2d 463).

On the precise issue presented in the petition for a writ of certiorari herein, the Sixth Circuit Opinion is in full accord with the Fifth Circuit's decision in **Mitchell v. T. F. Taylor Fertilizer Works,** 233 F. 2d 284. The Secretary of Labor's proof in that case followed his apparently invariable pattern, classification of defendant's fertilizer business according to such governmental sources as the Standard Industrial Classification Manual, the Census of Manufacturers, the Census of Business and a Farm Credit Administration circular. The Secretary's expert in this case was Professor Beckman, who testified in accordance with the "business use" test that "sales of fertilizer to farmers are not retail sales where the fertilizer is purchased for farm rather than personal or household use" (233 F. 2d 287). Defendant's proof consisted of testimony from persons experienced in the fertilizer industry that defendant's business was recognized in its industry as a retail establishment, that its sales to farmers were recognized in that industry to be retail sales; it was stipulated that others in this industry would testify in the same way. The Fifth Circuit held that Professor Beckman's definition of a retail sale as one made for

household or personal use "was precisely the concept which was rejected by Congress in amending the Section," citing the **Boisseau** decision, *supra*, and quoting the pertinent part of the House Managers Statement on the 1949 amendment (233 F. 2d 288). After commenting generally that, while possibly valid for census or other purposes, Professor Beckman's definition would not be material to the application of § 13 (a) (2) unless recognized in the defendant's particular industry, and after noting specifically that Professor Beckman neither had any personal knowledge of the fertilizer industry nor any interest in acquiring such knowledge, the court held:

> "The expert believed the matter governed by general definitions, which, if Congress had so intended, could have been placed in the Act itself. The fact that Congress referred the matter to industry recognition indicates that it intended a more flexible rule, adaptable to the many various branches of industry. In the determination of what is recognized as retail in an industry, the opinion of industry members would be relevant, and the trial court did not err in basing its findings of fact upon their testimony."
>
> 233 F. 2d 288.

The Court of Appeals for the Fourth Circuit has also rejected the petitioner's continued insistence upon application of the "business use" test in § 13 (a) (2) cases, **Wirtz v. Modern Trashmoval, Inc.**, 323 F. 2d 451, cert. den. 377 U. S. 925. This was probably the last case on the only point raised by the petition herein which was published before the Sixth Circuit's decision in the case at bar. It is consistent on this point with the Sixth Circuit's decision herein and the decisions of the Fifth Circuit discussed just above. In the Fourth Circuit case the defendant, Modern Trashmoval, Inc., offered managerial personnel of three unrelated trash removal businesses who stated their opinions that "the services performed by

Modern are retail services and are so regarded by the trash removal industry in general" (323 F. 2d 463). The Secretary argued that a court cannot rely on statements of persons in business within the industry to show that a defendant's activity is recognized as retail in that particular industry. This argument was rejected by the Fourth Circuit for these reasons:

> Each of the three industry witnesses was "well-qualified to state both his personal opinion and the general opinion of persons in the industry as to what was recognized as a retail service in the industry."
>
> A review of pertinent parts of the legislative history of the 1949 amendment of § 13 (a) (2) revealed that "the only proper background for defining a retail or service establishment in a particular industry is the understanding of the people dealing in that industry as to what constitutes retail services or retail sales."
>
> 323 F. 2d 466-467.

The Secretary's expert was a college marketing professor and writer, who testified from the Standard Industrial Classification Manual and from marketing text books by Dr. Beckman (323 F. 2d 463, 467). The Fourth Circuit observed that this professor "made it abundantly clear that he was not familiar with the trash removal industry, its methods or operation, or the opinions of its practitioners" (323 F. 2d 467); that, while this professor's views might have authority in his academic field, his distinction between retail and wholesale was of no effect in a § 13 (a) (2) case, "because it was based upon the 'business use' test which can no longer be used in considering exemptions under section 13 (a) (2)" (Ibid.). The Fourth Circuit held that the opinion evidence of the three witnesses active in the particular industry was sufficient proof by the defendant of its exempt status under § 13 (a) (2).

The "basic question" in this case according to petitioner's brief is whether the recognition in the particular industry test under § 13 (a) (2) is to be determined according to "the words used in the industry" or according to "the functional characteristics of the industry and of the sale". The decisions upon this question by the First, Fifth and Sixth Circuits are then said to be in conflict. As related above, the First Circuit has not decided this question at all. In **Aetna Finance Co.** that Circuit did not reach this question; it decided that case on the more fundamental "retail concept" issue. In the **Casa Baldrich, Inc.**, case the same Circuit followed Rule 52 (a) of the Federal Rules of Civil Procedure, thus stated no qualitative criteria of its own about the evidence. The Fourth, Fifth and, in this case, the Sixth Circuits have decided this issue, but without conflict. None of them would likely accept petitioner's phrase, "the words used in the industry" as accurately stating the first alternative. Each of these Circuits would concur in the view that courts should rely upon words used by persons experienced in a particular industry when testifying as expert witnesses and when stating their opinions as to what is recognized in a particular industry to be a retail sale. Petitioner's phrase for the second alternative, "the functional characteristics of the industry and of the sale" must refer to definitions from such of the petitioner's invariable sources as Dr. Beckman's text books or the Standard Industrial Classification Manual. There would be no conflict between decisions by any Circuits on this alternative. Those sources have been and must be rejected by every Circuit to which same are or have been offered; they are consistenty recognized to state the "business use" test, which has not properly been available to petitioner in a § 13 (a) (2) case since this Court's decision in **Kentucky Finance Co.**

**"Words" or "labels" are not the test applied by the Court below:**

Throughout his brief petitioner reiterates a forced or twisted interpretation of the Sixth Circuit decision in this case. It is that Chief Judge Weick's opinion for that Court construes "recognition" in the particular industry to mean words or labels currently used in the industry. Petitioner's argument with this construction stems from his suspicion, expressed in his brief, that by making words "mean what they want them to mean" members of an industry "could elect not to be subject to the Act" (p. 13). Neither the petitioner's interpretation nor any grounds for his fears can be found in the opinion of the court below in this case. The opinion for the Sixth Circuit refers at one point to proof of the "customs and practices and the two fold recognition of sales in the industry for more than 20 years" (330 F. 2d 808). At another point the phrase is the "habits and practices in the tire industry," which were "not of recent origin nor were they adopted to avoid the provisions of the Act, but were traditional and existed for many years before the amendment was enacted" (330 F. 2d 809).

The last phrase quoted above from Judge Weick's opinion in this case provides petitioner with full protection against businesses which he suspects have or will adopt a word meaning or label to avoid wage-hour requirements. That same phrase complies fully with the legislative intent that when construing the 1949 amendments to § 13 (a) (2), courts would determine "what are the habits and practices in the industry" (95 Cong. Rec. 12510). It was recognized that by reliance upon the habits and practices in an industry courts would avoid giving industries the right to decide the exemption question for themselves because, "hardly an industry can be found in which the question of what is retail and what is wholesale has not been settled for years. It is a question of fact just as

much as any other question of fact" (95 Cong. Rec. 12516).

The record in this case amply supports the findings of the courts below that the same definition of a retail sale had been recognized in the tire industry long before the amendment to § 13 (a) (2) was enacted in 1949. The joint memorandum by the "Big 4" tire companies to the Wage-Hour Administrator in 1954 (R. 280a) had attached to it records of Goodyear Tire and Rubber Company starting in 1934 (R. 282a), and records of Firestone Tire and Rubber Company (R. 283a) which covered a period commencing in 1935 (R. 613a). These exhibits reflected that before 1954, "for more than twenty years the tire industry has uniformly recognized that sales for resale are wholesale, and that sales of tires to consumers are retail irrespective of the character of the purchaser, the use to which the tires will be put, the quantities purchased, or the price paid for such tires" (R. 854a-855a). The same "Big 4" memorandum (R. 849a) and a memorandum submitted to the Wage-Hour Administrator by the retail tire dealers' trade association (R. 887a-888a) both point out that the practice of classifying retail sales in this same way was recognized in the tire industry before 1934 and was followed by NRA Codes in 1934. The same definition of retail sales as recognized in the tire industry was also adopted in O. P. A. regulations during the early 1940's (R. 427a-429a, 861a, 888a-889a).

This record does not, however, support petitioner's assertion on page 8 of his brief that the two part sales classification recognized in the tire industry for so many years before 1949 was said by tire industry personnel to have come from sales tax definitions. The only tire industry witness asked about this thought that the tire dealers' definition "came first" before sales tax classifications adopted the same definition (R. 304a). Whichever came first, classifications of retail sales for purposes of sales

taxes were approved during debate of the 1949 amendments of § 13 (a) (2) as definitions by officials who "are supposed to know the difference between wholesalers and retailers" (95 Cong. Rec. 12502).

Thus the court below based its decision in this case on customs and practices in the tire industry, the recognition of which was fully documented during many years before 1949. That decision is expressed explicitly in terms of the long-standing customs and practices recognized in the tire industry, not in terms of "words" or "labels" currently in calculated use in the industry. As such the opinion below will be of no help to businesses, if any, which might act in accord with petitioner's suspicions for avoidance purposes.

**Respondents are eligible for exemption under traditional concepts.**

Petitioner argues at page 26 of his brief that respondents' sales of larger or specialized tires are not within the "retail concept", but concedes that their sales of tires for use on passenger cars and on local delivery trucks fall within traditional concepts of retailing. Petitioner cites no authority, and we can find none, for the proposition that a retailer, otherwise eligible under traditional concepts of retailing to prove its right to exemption under § 13 (a) (2), becomes ineligible to do so if some of its customers are engaged in commerce. Under that contention by petitioner a corner drug store would become ineligible for exemption as a retailer if it sold pharmaceuticals or supplies to a company nurse employed by a nearby plant to give first aid or other medical attention to workers in that plant. Under petitioner's contention virtually every gas station on or adjacent to any highway would be excluded from the "retail concept" by virtue of its sales to transient trucks. This contention is contrary to the expressed legislative intent when § 13

(a) (2) was amended in 1949. When first offering the recognition in the particular industry test in the House Mr. Lucas made it clear that the purpose of his proposed amendment was, in part, to make sure the Wage-Hour Administrator treated businesses such as "repair garages, filling stations, and the like 'as retailers, whether they sold to private householders or to business customers' " so long as they are regarded as retailers in their own industry (95 Cong. Rec. 11003-11004). After full debate and passage in the House and in the Senate, the 1949 amendment was described by the Conference Report as follows:

> "Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service."
>
> 95 Cong. Rec. 14932.

The same Conference Report emphasized that, as to sales made to customers in a retailer's own state, under § 13 (a) (2) it is immaterial that such customers "are engaged in interstate commerce or in the production of goods for interstate commerce" (95 Cong. Rec. 14931).

Nothing in the legislative history of the 1949 amendment of § 13 (a) (2) or any other source authorizes petitioner's attempted piece-meal exclusion of a business from the "retail concept". The plain intent of the 1949 enactment was to permit every retailer who sold to any and all users or consumers of his products to qualify if he could under the recognition in the particular industry test. As noted above, the § 13 (a) (2) exemption was not to be denied to such a retailer because some of his customers were industrial or commercial users of such products. A business would properly be considered outside the "retail concept" if it "engaged in the sale and servicing of manu-

facturing machinery and manufacturing equipment used in the production of goods'' (95 Cong. Rec. 14932) because all of its customers would be manufacturers.

The petitioner's contention that part of respondents' sales should be excluded from traditional retail classification and other contentions by petitioner are based upon the erroneous assertion that respondents' tire sales to bigger businesses were in larger units or quantities at lower prices than were respondents' tire sales to small businesses or individuals. This assertion is not supported by the record. Respondents sold the same tires a few at a time for the same price to big truck lines and to individuals who owned one or two trucks (R. 250a-252a). Owners or operators of fleets typically buy tires a few at a time, first from one, then another tire store according to which vendor sells at the lowest price at a given time and offers most service (R. 118a-120a, 67a, 161a, 165a, 168a-169a, 220a-223a). At those places in this record virtually every customer of respondents called as a witness by petitioner at the hearing of this case, testified that it was respondents' service at night, on weekends or on holidays which persuaded those customers to deal with respondent. The transactions between respondents and fleet operators were not sales in large quantities at quantity discounts, but were sales of a few units when needed for immediate use by fleet operators, coupled with such services as periodic inspection, rotating, matching and pulling of tires at the customers' places of business. The same prices and the same services were available to customers of all size or type (R. 82a, 83a, 85a-86a).

## CONCLUSION.

The issue in this case is whether the phrase, ''recognized as retail sales or services in the particular industry'' in § 13 (a) (2) of the Fair Labor Standards Act is to be construed and applied according to the habits and prac-

tices in the particular industry over a long period of time as expressed by persons having long and varied experience in the particular industry, or is to be construed and applied according to academic or governmental sources which classify sales and services according to the "business use" test specifically rejected in 1949 by a dissatisfied Congress.

The courts below in this case interpreted the legislative history of the 1949 amendments to § 13 (a) (2) of said Act as authorizing courts to determine how particular sales were thought of in a particular industry when construing that Section and as making the understanding of the people dealing in the particular industry as to what constitutes retail sales or retail services a proper basis upon which to decide a § 13 (a) (2) case. In reaching its decision to accept testimony from persons qualified as experts in the particular industry the Sixth Circuit Court of Appeals is in accord with decisions by the Court of Appeals for the Fifth Circuit in **Boisseau v. Mitchell**, 218 F. 2d 734, and **Mitchell v. T. F. Taylor Fertilizer Co.**, 233 F. 2d 284, and by the Court of Appeals for the Fourth Circuit in **Wirtz v. Modern Trashmoval, Inc.**, 323 F. 2d 451, cert. den. 377 U. S. 925. In refusing to apply the "business use" test in this case the courts below are in accord with this Court's decision in **Mitchell v. Kentucky Finance Co.**, 359 U. S. 290, and therefore are in accord with all Circuits.

In this case the trial court found as a fact that a sufficient part of respondents' tire sales and services are recognized as retail sales and services in the tire industry to entitle respondents to exemption under §§ 13 (a) (2) and 13 (a) (4) of said Act. The court of appeals was not convinced that the District Judge made any mistake in his findings of fact and held that his conclusions of law were correct. The trial court's findings of fact are supported by the unanimous opinion of qualified persons

having long experience at various levels and in various capacities in the tire industry as to what is and for many years before 1949 consistently had been recognized as retail sales and services in the tire industry. The circuit court herein held that such findings were not clearly erroneous. We submit that this Court should follow the same rule and deny the petition for a writ of certiorari in this case.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 31

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

*v.*

STEEPLETON GENERAL TIRE COMPANY, INC., AND A. E. STEEPLETON

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 32a–39a) [1] are unofficially reported in 15 WH Cases 582 and 45 Lab. Cases ¶ 31,315. The opinion of the court of appeals (R. 895a–902a) is reported at 330 F. 2d 804.

### JURISDICTION

The judgments of the court of appeals were entered on April 27, 1964 (R. 902a). A petition for rehearing

[1] "R." refers to the printed Transcript of Record in two volumes, and "App.," to the appendix to this brief.

was denied on August 3, 1964 (R. 903a). The petition for a writ of certiorari was granted March 1, 1965 (R. 905a). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether respondents' sales of tires and tire services, at substantial discounts, to trucking companies, other operators of fleets of vehicles, and governmental agencies were "recognized as retail sales or services in the particular industry" within the meaning of § 13 (a) (2) and (4) of the Fair Labor Standards Act, thereby entitling respondent to exemption as a "retail or service establishment" from the minimum-wage and overtime provisions of the Act.

## STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are set forth in App. B, *infra*, pp. 47–48. The provision particularly involved here is Section 13(a)(2) which reads as follows:

> The provisions of section 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as

retail sales or services in the particular industry; * * *.

## STATEMENT

This action was brought by the Secretary of Labor under § 17 of the Fair Labor Standards Act (29 U.S.C. 217) to restrain violations of the minimum wage, overtime, and record-keeping requirements of the Act (R. 8a, 18a). Respondent admitted that it had not complied with those requirements (R. 22a, 30a), but contended that its employees were not engaged in interstate activities within the Act's coverage, and that the business was an exempt "retail or service establishment" under §§ 13(a)(2) and 13(a)(4) of the Act (R. 13a-16a). The court of appeals, affirming the district court, held (1) that the employees were "engaged in commerce or in the production of goods for commerce" within the Act's coverage, but (2) that respondent's business was exempt as a "retail or service establishment," because more than 75% of its sales were "not for resale" and were "recognized as retail sales or services in the particular industry" within the meaning of § 13(a)(2).

1. Respondent Steepleton General Tire Company, Inc. ("Steepleton"),[2] a franchised dealer for General Tire & Rubber Company at Memphis, Tennessee, is engaged in selling, repairing and servicing tires in an area which includes neighboring parts of Tennessee, Arkansas, and Mississippi (R. 33a, 46a, 109a). During the period involved in this suit the company

[2] The President of the corporation, A. E. Steepleton, was also joined as a defendant, but for simplicity we will refer to the corporation as the sole respondent.

did a gross annual business of over $900,000, and employed about 47 employees (R. 28a, 33a), many of whom were regularly employed to make sales and deliveries of merchandise in interstate commerce; to recap tires for delivery out-of-State; and to remove, repair, recap and mount tires for commercial vehicles operated by customers in interstate commerce (R. 33a, Fdg. 4).

More than half of Steepleton's dollar volume of business is derived from sales to customers operating multiple units, or "fleets", of commercial vehicles and to industrial enterprises such as construction contractors operating heavy earth-moving equipment in the construction of highways and river improvements (R. 76a, 77a, 109a–110a, 177a, 185a–186a, 247a–248a). While respondent offered no evidence of the percentage of its sales of tires and services to particular customers or specific types of customers, the record is clear that most, if not all, of the largest customers operate their vehicles substantially in interstate commerce.[3] For such large customers, respondent fur-

[3] These customers include, for example, Gordon's Transport Company, a multi-state common carrier operating about 1,000 vehicles (R. 110a, 216a); Southwestern Transportation Company (probably Steepleton's largest customer, R. 75a), another interstate common carrier, at whose place of business Steepleton keeps an employee every day to handle the large volume of business for "those trucks [which] come in and out of there at all times of the day and night" (R. 79a, 109a–110a); White Rose Industrial Laundry, which operates a fleet of 75 trucks and cars, with at least 23 trucks operating regularly in interstate transportation (R. 166a–167a); Woody Herrin, a produce dealer, who regularly operated eight over-the-road refrigerated transport trucks traveling to practically every state in the Union (R. 177a) which were serviced two or three times a

nishes regular repair, replacement and inspection services, not only in its shop (which remains open 12 hours a day and provides round-the-clock emergency call service, R. 78a, 122a–123a, 234a), but also daily or weekly at the major customers' own places of business, adapting the services to the customers' special needs (R. 78a–79a, 109a–110a, see fn. 3, p. 4, *supra*). Seventy-five per cent of the respondent's recapping and repair services, alone comprising 35% of its gross dollar volume of sales, is performed on tires for trucks or other heavy industrial equipment of its commercial customers. (R. 48a, 265a.)

2. Representatives of the tire industry (whose testimony was confirmed by respondent's expert witness, Dr. Leigh, R. 793a–795a) testified that it is the practice of large tire establishments (such as Steepleton) to divide their sales operations into three compartments—"a tire division selling at retail, a tire division selling commercially, and a tire division selling at wholesale" (R. 345a). The "retail" division typically makes over-the-counter sales of passenger tires in small quantities to individual purchasers for their personal use. The wholesale division handles

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week by Steepleton's employees (R. 178a); Robilio and Cuneo, food products manufacturers operating several of their 23 vehicles in transporting their products to three other States (R. 181a); Klinke-Reed Dairy, three of whose trucks regularly traveled between Tennessee and Arkansas (R. 174a); A. S. Barbaro, a wholesale beer distributor regularly operating two over-the-road transport trucks which hauled beer from Belleville, Illinois, to Memphis (R. 213a); and Central States Dredging Company, which operated 14 vehicles including Mack dump trucks and pickups used in dredging and hauling supplies in five States (R. 185a–186a).

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sales to dealers for resale. And the third, or "commercial," division ordinarily specializes in the sale of truck tires, usually in large quantities, to trucking fleets, construction companies, airlines, or other commercial users. To solicit the commercial sales, such establishments, including respondent Steepleton, employ a separate staff of "commercial," as distinguished from "retail," salesmen (*e.g.*, R. 51a, 105a–106a, 263a, 344a–345a, 401a–402a, 404a, 467a–469a, 440a, 453a–454a, 793a–795a).

Mr. Marsh, the executive director of the industry's trade association testified that the "series of discounts on commercial tires and truck tires is different from the deals made on new passenger tires" (R. 345a). In a letter to the Wage-Hour Administrator, he explained that "the custom in the industry [is] to sell at a price which declines as the amount of tires purchased by a buyer increases," in accordance with a generally recognized scale of discounts (often recommended by the manufacturer) from the manufacturer's list prices, with the specified discount percentages differing for sales to commercial users, to the large fleets, and for national accounts (R. 870a–872a).[4]

[4] Marsh described the scale of discounts as follows (R. 871a):

> * * * Recommended discounts for truck tires to the commercial users are 10–10% [*i.e.*, 19%, the second 10% discount being based on the price remaining after the first] with a suggested 10–10–10% for the larger fleets and 10–10–10–10% where delivery is made to "national" accounts such as Swift & Co. operating motor vehicles in many places. (One larger tire manufacturer has a discount program of 10–10–10–5%, with an increase to as much as 10–10–10–10–10–5% for the very large buyer; if the dealer sells at this latter discount, he can replace his

Such reductions are offered because of the advantages stemming from large-volume sales (R. 871a).

Also introduced in evidence was the Wage and Hour Administrator's Interpretive Bulletin classifying sales in the tire trade (Pltf. Ex. 6, printed as App. A, *infra*, pp. 43–46). The Bulletin classified as other than "retail": (1) sales made pursuant to a formal invitation to bid, such as are typically made to government agencies; (2) sales made to "national accounts" (sales in which delivery is made by a local tire dealer under a centralized pricing arrangement between the customer's national office and the tire manufacturer); and (3) sales to "fleet accounts" (customers operating five or more vehicles) at prices equivalent to those charged on sales for resale.

3. The representatives of the tire industry further testified that the word "retail" was generally used in the tire industry to denote any sale not for resale, regardless of the kind or number of tires sold, the discounts given, the nature of the customer, or any other functional characteristic (*e.g.*, R. 235a, 288a–289a, 303a, 397a, 404a, 461a, 467a–468a, 656a–657a). There was testimony, for example, that the quantity sale, or

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stock from the manufacturer at a corresponding discount.) Technically, the independent tire dealer can refuse to deliver his merchandise to consumer purchasers at these discounted prices, but he makes such a decision with full knowledge that the company-owned store of one of the tire manufacturers will quickly take over the account and might even quote a larger discount.

Again, many of our members sell tires in large quantities to trucking companies at a special discount from the list price, both the discount and the list price being suggested by the manufacturer.

specialized retreading, of airplane tires for a commercial airline; the sale of thousand-pound "earthmover" tires to a construction company; or the sale, at a substantial discount, of 50 to 100 of the largest type truck tires to an interstate common carrier, would all be characterized as "retail" no less than the over-the-counter sale of a single passenger tire to an individual purchaser (R. 247a–249a, 258a–261a, 690a–692a). This use of the word "retail," as synonymous with "not for resale", was confirmed by Dr. Leigh, respondent's expert witness (R. 429a, 434a–458a), and accounting documents dating from 1934 showed that the usage was of long standing in the industry.

The only explanation offered for the industry's usage was that it conforms with most State sales tax statutes (including Tennessee's) and hence facilitates the computation and payment of the tax (R. 236a-239a, 248a–249a, 253a, 303a, 353a, 397a, 579a). Thus respondent Steepleton explained that he classified as "retail" quantity sales of the largest type truck tires for customers like Gordon's Transports, sales of Earthmover tires to contracting companies, and sales of aircraft tires for large commercial airlines (R. 247a–248a) because: "We would still have to charge sales tax on this * * * so it would still be a retail sale" (R. 249a). Similarly, the trade association executive secretary (Marsh) stated that characteristics such as "discount or price or quantity or anything else" "would have very little effect on the tire dealers' classification of the sale because in the majority of the States in the United States, they must classify a sale to a user for sales tax purposes * * *" (R. 303a). He

explained that he would classify as "retail" even quantity sales of "earth moving tires for big equipment on a big contracting job," because "if they were in the State of Ohio we would have to pay sales tax" on such sales (R. 353a).[5]

The record also shows frequent use in the industry of the term "retail" in various other senses—*e.g.*, in the distinction drawn by the same industry witnesses between the "retail" departments (over-the-counter sales of passenger-car tires) and the "commercial" departments (sales of truck tires to commercial users) of the larger establishments (see pp. 5–7, *supra*). As the trial court's findings confirm, some tire dealers segregate "commercial accounts sales" into a separate category "covering truck tire sales to business firms" to whom sales are made "for only a small margin over their cost" and "[p]articular salesmen may be assigned by a dealer to specialize in sales of this nature" (R. 36a). Also, as the court of appeals acknowledged, some of respondents' commercial *customers*

[5] Dr. Brooks, a marketing economics expert testifying on behalf of the Secretary, pointed out that sales tax statutes are designed "to collect revenue," and that the term "retail" in such statutes is defined for the sole purpose of designating those sales on which the tax must be paid (R. 721a–722a). Apart from this purpose of the tax statutes, he did not know "any respectable authority that holds that every sale that is not for resale is retail" (R. 720a). Dr. Moore (also a marketing expert witness for the Secretary), who had participated in a legislative council study which, among other things, considered a redefinition of the Tennessee sales tax, pointed out that "the major factor" in retaining the present definition was simply "the financial one * * * it brings in more money," adding: "I don't believe that anyone would argue that the sales tax is intended to be exclusively retail sales tax" (R. 746a).

"regarded their purchases of tires at discounts as wholesale purchases" (R. 900a). These customers, indeed, emphatically denied that they purchased at retail.[8]

4. The district court concluded as a matter of law that, in making the exemption turn on whether the sales were "recognized as retail sales or services in

[8] Some 22 such customers, all of whom operated 10 or more commercial vehicles—were called by the Secretary as witnesses. Their characteristic response to the question "whether or not you were buying those tires at retail," was that they were *not* buying at retail, but at "fleet-owner discounts." A typical example is the response of a fruit and vegetable produce distributor (operating 20 vehicles including several refrigerated over-the-road tractor trailer trucks): "At retail, no. I was considered a fleet-owner truck and you have fleet owner discounts and we would buy at fleet owner discounts," which he considered as buying at "wholesale, yes sir" (R. 179a). A food manufacturer, operating 23 trucks, answered "I was buying them on the fleet owner's price * * * I would imagine that that was a discount from the retail price because of the volume of tires we were using" (R. 182a), and in response to a question on cross examination as to whether he would consider that "necessarily wholesale," said "I would think so" (R. 183a). Also, an official of a wholesale beer distributor operating 18 trucks, responded, "No," his company did not buy "at retail prices"—"we got a fleet discount" (R. 214a–215a); the superintendent of a bus line, operating 14 passenger vehicles testified that he purchased bus tires in quantity "at fleet discount" (R. 187a–188a); and an official of a dredging company operating 14 vehicles (including a number of Mack dump trucks and half-ton pickups), answered "we would be buying them below retail" (R. 187a). Similarly, the manager of an industrial laundry operating at least 75 trucks and cars, stated flatly: "we are *not* buying them [tires] at retail" (R. 170a, emphasis added).

After some 16 such witnesses had testified, counsel for defendants offered to stipulate that several remaining customer representatives who were subpoenaed by the Secretary would testify substantially the same as the others (R. 218a–219a).

the particular industry" (§ 13(a)(2)), Congress intended "to give recognition to the particular industry's own classification of those sales which are by it considered to be retail sales under the Act" (R. 38a). Finding that the word "retail" was used in the tire industry to denote any sale not for resale, regardless of any functional differentiations among the various classes of such sales,[7] the court held respondent to be exempt as a "retail and service establishment" under § 13(a)(2) and (4) (R. 39a).

The court of appeals affirmed, upholding the district court's finding of the industry's word usage as not clearly erroneous and by implication approving its interpretation of the statute. Although the court referred frequently to the industry's "practices," "customs," and "habits," the context in each case makes clear that it was referring only to the industry's linguistic practices and, like the district court, regarded any functional differentiation among classes of sales (in price, quantity, use, etc.) to be irrelevant.[8]

[7] "In the tire industry sales for resale are recognized to be wholesale sales. Whereas, sales of tires to consumers or users of same are recognized to be retail sales regardless of the character or identity of the purchaser, the use to which the tires may be put, the quantities purchased or the price paid for such tires." Finding 9, R. 34a; see also Finding 14, R. 36a.

[8] See, *e.g.*, its reliance on the testimony of the "Big Four" representatives who "related the customary practices and habits in the tire industry" as being that: "Where the sale was made to an ultimate consumer it was regarded as [*i.e.*, called] retail whether made to an individual for his personal use, to a business, industrial firm, trucking or bus company and irrespective of quantity, price or discounts" (R. 898a). See also its reliance on the testimony of Dr. Leigh that the industry's "practice" was to "call" sales not for resale "retail" (R. 899a),

While the court did not advert to the question of interpretation as such, its opinion as a whole thus makes clear that it, like the district court, interpreted "recognized as retail," as used in the statute, to mean "labeled as retail" and nothing more.

## ARGUMENT

### *Introduction and Summary*

Section 13(a)(2) of the Fair Labor Standards Act, with exceptions not in issue here, provides that the minimum-wage and overtime provisions shall not apply to "any employee employed by any retail or service establishment." A "retail or service establishment" is defined as any establishment 75% of whose annual dollar-volume of sales "is not for resale and is recognized as retail sales or services in the particular industry." Respondent's sales of tires to other dealers for resale were less than 25% of its total sales, but its "sales for resale," plus its sales of tires and services to trucking companies, "fleet" owners, and governmental agencies totalled far more than 25%. Respondent's exemption turns, therefore, upon whether the latter sales were "recognized as retail sales or services in the particular industry." The answer to that question depends in turn upon the meaning to be given to the quoted phrase.

Regardless of who is charged with characterizing particular business transactions as either "retail" or

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and on the testimony of Marsh and Hedlund (R. 898a), who repeatedly referred to the industry's "terminology," "nomenclature," or "verbiage" (*e.g.*, Marsh R. 321a, 322a; Hedlund R. 694a–695a; 639a).

"other than retail" for purposes of the Fair Labor Standards Act, at least two separate questions must be answered. First, it has long been recognized that the sale of certain types of goods (*e.g.*, manufacturing machinery) and the furnishing of certain types of services (*e.g.*, lending money) fall wholly outside the purposes of the statutory exemption and do not come within the Act's "retail" concept at all, whatever the quantity or price terms of the particular transaction. See *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290. An initial question which must always be answered, therefore, is whether the sale of goods or services of a particular type can ever be "recognized" as retail. The second question concerns the manner in which goods which can be sold at "retail" are in fact sold. For example, it is necessary to determine whether an unusually large quantity of goods and services sold at a discount price—a sale which, from the seller's point of view, is substantially the same as a sale for resale—may be considered a "retail" sale.

Thus the present case requires both (1) a determination whether the sales of tires and tire repair and maintenance services designed or adapted specially for the operation of large truck or bus carriers in interstate commerce can ever be considered retail; and (2) a determination whether sales of tires and services of a type which could be sold at retail are retail sales when sold to "fleet" operators or government agencies in unusually large volume at quantity discount prices. If these two determinations are to be made by inquiring how Congress contemplated such

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sales would be considered, it is, we believe, clear that neither would be considered retail.

Both the House Conference Report and the Report of the majority of Senate Conferees, made clear that "the amendment * * * does not exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods [for interstate commerce] * * *" (95 Cong. Rec. 14932), "[n]or * * * change the status of * * * establishments selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment held nonexempt in *Roland Electric Co.* v. *Walling*, 326 U.S. 657)" (95 Cong. Rec. 14877).* If Congress regarded the sale of "manufacturing equipment" for use in producing goods for commerce as wholly outside the retail concept, the same view would necessarily follow, we submit, with respect to the sale of a truck tractor-and-trailer rig specifically designed for "over-the-road" hauling in interstate commerce, the sale of earth-moving equipment used in highway and river-improvement construction, or, as here, the sale of tires of a type and size suitable for use only on such vehicles, and the sale of tire-maintenance services of a type used only by large-scale commercial carriers. (See *infra*, pp. 35–38.) What Congress contemplated as to volume sales at a quantity discount is also clear from the

* Only this type of sales is in issue in *Wirtz* v. *Idaho Sheet Metal Works*, 335 F. 2d 952 (C.A. 9), certiorari granted, 380 U.S. 905.

legislative history. Senator Holland, the sponsor of the 1949 Amendment in the Senate, stated repeatedly and unequivocally that he thought that a sale "in such quantity that discounts are allowed" would "[o]f course" be "in the category of wholesale sales" (95 Cong. Rec. 12501) and that, "[A]s a general rule, sales in quantities substantially larger than those to the average buyer and at a substantial discount are regarded as wholesale and not as retail" (*id.*, 12505).

The courts below have held, however, that Congress did not intend to decide for itself—and did not intend to authorize the Administrator of the Act and the courts to decide—what was meant by "retail" sales for purposes of the statutory exemption. The holding below is that Congress intended both the question what types of goods and services could be sold at retail and the question what quantity sales at a discount would be considered retail to turn solely on a finding of fact as to how the word "retail" was used in each particular industry. Thus the primary issue in this case is whether the requirement that 75% of an establishment's sales be "recognized as retail * * * in the particular industry" presents a question of law to be resolved by the courts in light of the Congressional intent and the purposes of the exemption, or presents a question of fact as to usage of the term "retail" in a specific business.

We contend that the statutory phrase "recognized as retail * * * in the particular industry" simply means "accorded the treatment given retail sales in that industry," and that Congress therefore left for the determination of the Administrator and the re-

viewing courts two basic legal questions: (1) whether a sale of a particular type of goods or service can ever be considered retail; and (2) whether the manner of sale—for example, the quantity and price at which the goods are sold—so differs from the ordinary retail sales in the industry that the particular transactions were not in actual practice "recognized as retail sales or services in the industry."[10]

This conclusion is dictated, first, by the difficulties inherent in adopting a construction which makes the scope of the Act turn upon the labels used in an industry. An industry will rarely, if ever, have a single and uniform use of the word "retail." The concept is almost always used with different scope for different purposes by different people in the industry, as is the case in the tire industry. While a lexicographer could estimate the frequency of different uses of the term for purposes of giving order to a list of definitions, Congress could not have intended the scope of the Fair Labor Standards Act to turn on a counting of the frequency of uses of the term. Nor could it have meant the application of the federal

[10] Thus, to determine the legal question whether a particular sale of 2,000 pounds of sugar was "retail," the Administrator and the courts would have to look to the practices in the industry both to determine the volume in which sugar is normally sold to consumers and to determine whether this sale was recognized as retail by being accorded substantially the same treatment as an ordinary retail sale. Since sugar, unlike coal, is not normally sold by the ton, a sale of 2,000 pounds of sugar would be retail only if it were "recognized as retail * * * in the industry" by being accorded the same treatment as a normal retail sale, *i.e.*, if it was not sold at a substantial quantity discount like that accorded wholesale sales.

statute to turn on the scope of State sales tax acts or other determinants of the industry use of the word "retail" which are irrelevant to the purposes of the federal Act. Finally, making the application of the Fair Labor Standards Act depend upon industry word-usage inevitably means that the very parties regulated are free to determine whether they should be regulated—a consequence far too self-defeating to be attributed to Congress.

Beyond this, the legislative history of the Act demonstrates affirmatively that Congress intended to define the scope of the exemption as a legal concept and, indeed, made clear the areas it wished to exclude from the exemption, as this Court has already recognized in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290. The leading spokesmen for the bill specified the only areas of prior law which they wanted to change and also defined the areas that were to remain unaffected, repeatedly denying the charges of the bill's opponents that the effect of the amendments would be to allow the individual industries to determine whether the Act would apply to them (a necessary consequence of the decision below).

## I

### AN INTERPRETATION OF THE STATUTE WHICH MAKES COVERAGE TURN ON HOW THE WORD "RETAIL" IS USED IN AN INDUSTRY DEPRIVES THE STATUTE OF RATIONAL CONTENT

Interpreting the statute so that applicability of the retail exemption depends on how the word "retail" happens to be used in a particular industry at best

makes its scope turn on a matter which is irrelevant to any statutory purpose and may leave the question of coverage to the wishes of the very parties regulated by the Act. Moreover, the search for a uniform industry-wide meaning for a term such as "retail" will involve seeking a will-o'-the-wisp; a single established meaning rarely, if ever, exists.

1. Since words are typically used with many different meanings, not only by different persons but by the same persons for different purposes, there is no reason to suppose that the word "retail" would have a single identifiable meaning in a particular industry—being always used in only one sense by all persons associated with the industry. As we have indicated in the Statement (*supra,* pp. 5–10), the word "retail" is, in fact, used with at least three different meanings in the tire industry. Perhaps the most frequent usage is that adopted by sellers of tires for the purpose of complying with State sales-tax statutes, which define retail sales as broadly as possible for the purpose of increasing State revenues. Under the normal State sales-tax definition, any sale not for resale is labeled "retail." However, this is by no means the sole usage of the word "retail" in the tire industry. The record shows that it is the frequent practice in this industry to make a three-way division of sales to reflect the functional operations of the particular business enterprise. See, *supra,* pp. 5–7. For this purpose, many sellers of tires (including respondent Steepleton) label only routine, over-the-counter sales of passenger tires as "retail." Commercial sales of truck tires to large-volume purchasers

such as trucking fleets, construction companies, airlines, and other commercial users are put in a separate operating division which is generally labeled "commercial," rather than "retail." A third division, handling sales for resale, is labeled the "wholesale" division. Finally, for another purpose, still a different system of nomenclature is prevalent in the tire industry. The term "retail" is used to refer to a particular pricing policy which is applied to ordinary, small-volume purchasers. The record here shows that large-volume customers—*e.g.*, "fleet accounts"—vigorously denied that they were buying tires at retail, insisting that their purchases were something quite different (see Statement, *supra*, p. 10). As the court of appeals noted, such customers "regarded their purchases of tires at discounts as wholesale purchases" (R. 900a).[11]

[11] Officials of two of the "big Four" tire companies—Goodyear and Firestone—testified that their companies did not ordinarily use the terms "retail" or "wholesale" at all, but rather designated their sales as "consumer" or "dealer" sales, together with other designations by type of tires or by price charged, usually distinguishing sales to consumer "fleet accounts," "national accounts," and "government" from sales to lesser "consumers" (R. 572a–574a, 647a, 610a–611a, 612a–613a, 639a–640a).

According to respondent's own expert witness, Dr. Leigh, "all substantial tire dealers do three types of business," distinguishing between "regular retail" (*i.e.*, sales to individual customers owning one or two vehicles) and "commercial sales" to "trucking companies and national accounts" (*i.e.*, "owners of from 5 to 1,000 trucks constitut[ing] the so-called commercial market")—"[n]ot only the volume purchased but the discounts allowed and the services required set this group apart from over-the-counter buyers" (R. 793a–796a).

See, also, the Code of Fair Competition for the Rubber Tire Manufacturing Industry (Code No. 174, adopted Dec. 21, 1933)—in the drafting of which representatives of the "Big Four" participated—distinguished "Consumers' Lists" from "Consumers' Preferred Wholesale Lists," defining the former as applicable "to

In the face of this admitted prevalence of several quite different usages of the term "retail" in this industry, the factual finding of the courts below that the word "retail" was used generally to denote any sale not for resale is meaningless except as a numerical count of the relative frequency of such usage. We do not dispute the finding that the word "retail" has been used in the industry most often to label all sales "not for resale." But we contend that Congress could not have meant the application of the Act to turn on a factual finding as to the relative frequency of the various uses of the word "retail" by different persons for differing purposes; for such a finding bears no possible relationship to any conceivable purpose of the retail exemption.[12]

2. Moreover, as District Judge Kirkpatrick pointed out in one of the earliest decisions following enactment of the 1949 Amendment, a necessary implication of interpreting "recognized as" to mean "labeled as"

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the sale of tires and/or tubes to owners of less than five vehicles," whereas the "Preferred Wholesale Lists shall apply to commercial operators of five or more vehicles." See Codes of Fair Competition, Vol. IV, p. 348 (GPO 1934).

[12] Even if the only use of the word "retail" in the industry were that adopted to conform to State sales-tax statutes—and this is the sole explanation of the broad definition of "retail" in the present case—to make the scope of the exemption from the Fair Labor Standards Act turn upon the scope of State tax statutes imputes to Congress a wholly irrational and self-defeating purpose. The greater the desire of the State to collect revenue (and therefore the broader the definition of "retail"), the narrower would be the scope of coverage of the federal statute. The scope of the federal statute would, moreover, vary from State to State in a way wholly unrelated to its purpose.

is that any industry making sales not for resale could agree on a uniformly broad usage of the word "retail" and thereby elect not to be subject to the Act.[13] This is so obvious and simple a formula for complete avoidance of the statutory condition as to elude only the most ignorant or unsophisticated businessman. Businessmen are no less entitled than Humpty-Dumpty to make words mean what they want them to mean, and if the statute was intended to turn solely on word usage, there is no reason why they should not take advantage of it and adopt whatever usage entitles them to the proffered benefit. And if that is so, the statute is reduced to the absurdity of saying that every industry selling goods not for resale "shall" pay minimum wages, if, but only if, the industry is willing.

The court of appeals' construction of the statute does more than offend good sense and the settled canon that exemptions from the Fair Labor Standards Act are to be narrowly construed (*e.g., Phillips Co.* v. *Walling,* 324 U.S. 490, 493; *Arnold* v. *Ben Kanowsky, Inc.,* 361 U.S. 388, 392; *Mitchell* v. *Kentucky Finance*

[13] "[T]he difficulties involved in taking what an industry thinks or says about itself as the final and decisive factor in determining what constitutes a retail service establishment within the meaning of the Act is thus apparent. I suppose that it would not be too difficult for any trade association to adopt a deliberate policy of calling its business a 'service' business, a policy which, if persisted in long enough, could ripen into such recognition in the industry as would support plenty of testimony very much like that the defendant here has produced." *Tobin* v. *Household Finance Corp.*, 106 F. Supp. 541, 545 (E.D. Pa.), reversed on other grounds without ruling on the exemption question, *sub nom. Mitchell* v. *Household Finance Corp.*, 208 F. 2d 667, 672 (C.A. 3).

*Co.*, 359 U.S. 290, 295). It also raises serious doubts about the constitutionality of the statute. The way in which persons in an industry choose to define and use a word has no rational relationship to any purpose to be served by the Fair Labor Standards Act. A rule permitting industry members to decide for themselves whether the Act is applicable to them, or requiring one employer but not another to pay minimum wages solely because they use different dictionaries, would be arbitrary in the extreme, raising serious doubts about the consistency of the statute with the Due Process Clause.

## II

### THE LEGISLATIVE HISTORY OF THE PROVISION CONTRADICTS ANY INTENT TO MAKE THE INDUSTRY'S WORD USAGE CONTROLLING AND DEMONSTRATES AN INTENT TO MAKE THE DEFINITION OF "RETAIL" SALES A QUESTION OF LAW, RATHER THAN A QUESTION OF FACT

A. The primary purpose of the 1949 Amendment to the retail exemption is plain beyond debate. Congress was dissatisfied with an administrative construction of the term "retail" which was accepted by this Court in *Roland Co.* v. *Walling*, 326 U.S. 657—namely, that "retail" sales were only those to ultimate consumers "to meet personal rather than commercial" purposes (326 U.S. at 675).[14] What was objectionable was that this construction, if taken literally, made the business or nonbusiness purpose of the buyer the sole controlling test of "retail," regardless of the functional character-

[14] As shown below (*infra*, pp. 32–33), apart from the implications of this "dicta" in the *Roland* decision, Congress had no objection to *Roland's* holding and rationale.

istics of the sale, such as the nature, quantity, or price of the goods or services sold. The retail concept would not include even sales of ordinary consumer goods in ordinary consumer quantities at customary prices if the sales were made for any business use. Congress regarded a test that ignored these functional characteristics and focused only on the purpose of the buyer as "silly, illusory, and ridiculous" because it meant that, "if a housewife goes to a drygoods store to buy towels, that is a retail sale, but if the proprietor of a small hotel * * * goes into the same store, is served by the same clerk, buys the same number of towels, paying exactly the same price, under no circumstances can that sale be regarded as a retail sale, because it is for a business use" (95 Cong. Rec. 12494).

The 1949 Amendment, as explained by Senator Holland (sponsor of the amendment in the Senate), was "confined to [an] effort to get away from that kind of interpretation" (*id.*, 12494–95), and to "do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which, regardless of the size, and regardless of the fact that it is intrastate, can never be held to be a retail sale" (*id.*, 12498). In short, the basic purpose of the amendment was to have essentially similar transactions treated alike regardless of the business or personal purpose of the buyer. See *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 293–294.

B. The courts below have held that Congress intended to accomplish its objective by making the exemption turn upon a factual finding as to an in-

dustry's most prevalent use of the word "retail," without reference to the underlying purposes of the retail exemption and the functional characteristics of particular transactions. We submit that Congress used the phrase "recognized as retail * * * in the particular industry" to mean "accorded the treatment ordinary retail sales are given in such industry" and intended the courts to decide—in light of the functional characteristics of the transaction and the purposes of the exemption—(1) which, if any, sales of goods or services of the type in issue are retail in the industry and (2) whether the transactions in question are accorded essentially the same treatment as retail sales receive.

There is admittedly some ambivalence in the legislative history bearing on the significance of industry usage of terminology. Much of the discussion in the debates reflects an assumption or belief on the part of the sponsors that the functional characteristics which had traditionally explained and justified the retail exemption would closely coincide with the ordinary use of the word "retail" in each industry. Thus, they frequently spoke as if some pre-existing meaningful industry concept of "retail"—"discoverable in any industry by honest search"—would be the controlling standard. See 95 Cong. Rec. 12497, 12502, 12510, 12516, A4570. But the legislative history leaves little doubt that, in the final analysis, it was the objective functional characteristics of particular transactions—and not what they happened to be called—which was to control the scope of the statutory exemption. Whenever the suggestion was made that the amendment might be construed to permit industry

terminology to be determinative, there was not only emphatic denial of any such intent by the authoritative spokesman for the amendment, but explicit reaffirmation of the intent to preserve intact the statutory purpose of the original exemption and to make that purpose controlling. And this intent was reinforced by express endorsement of specific judicial rulings which were to remain unchanged by the amendment.

C. A clear indication that Congress intended to give a legal content to the phrase "recognized as retail * * * in the particular industry"—and did not regard it as simply a direction to look to industry terminology—is found in the use of that phrase in the Conference Reports. Certain types of transactions were there specified as excluded from the exemption. Although the conferees frequently stated their conclusions in terms of what was or was not generally "recognized" as retail, they plainly did *not* leave the door open to having these conclusions overturned by a factual finding of prevalence of a different word usage in the industry itself. Thus, the House Conference Report states conclusively that "[t]he amendment * * * does not exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods," adding by way of mere explanation that this is "because the sale and servicing of such equipment have never been recognized as retail selling or servicing in the industry which distributes or services that type of equipment." 95 Cong. Rec. 14932. Similarly, the statement that "there is no concept of retail selling or servicing in these industries" is simply the un-

challengeable legislative or legal predicate used to explain the inapplicability of the amended retail exemption to "banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc." *Ibid.*

A similar intent to impose a legal definition of the kind of business which can be "recognized as retail" is evident in the Report of the majority of Senate Conferees, 95 Cong. Rec. 14877. It is there stated that "[t]he conference agreement exempts establishments which are traditionally regarded as retail," explaining that "establishments which do not now have the exemption because the selling or servicing in which they are engaged is not considered to be retail * * * will not become retail or service establishments under the provisions of the conference agreement." The Senate conferees, like their House counterparts, list and categorize types of businesses which are insufficiently related to the purposes of the exemption to be "recognized as retail."

Thus the Conference Reports themselves make evident the intent to give legislative or legal content to the statutory phrase "recognized as retail"—*i.e.*, to provide a legal standard which is not subject to rebuttal by showing a contrary word usage in the particular industry. This was the holding of *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, where a small-loan business, although characterized as "retail" by the industry itself, was held ineligible for the exemption. There the Court concluded that it was not "intended by the amendment to broaden the fields of business enterprise to which the exemption would apply,"

but only to broaden the standard to be applied to particular sales by "business enterprises otherwise eligible under existing concepts to achieve exemption" (359 U.S. at 294). In so holding, the Court necessarily construed the statute as turning on something other than the industry's word usage; it was on the meaning of the word "retail" as it was used by Congress, not as it was used by the industry, that the decision turned—*i.e.*, on a legal characterization, not simply a factual "finding" of the industry's word usage.

There is abundant evidence in the legislative history that the *Kentucky Finance* holding was dictated by a Congressional purpose—repeatedly emphasized in the debates—to preserve the basic limitations on the exemption as originally enacted. Knowing that sales of certain types of goods (*e.g.*, manufacturing equipment) and certain types of transactions (*e.g.*, sales in quantity at a discount price) had never been considered "retail" within the meaning of the exemption, the sponsors of the 1949 Amendment repeatedly and emphatically stated that nothing in the amendment was intended to change these results. Its only purpose was "to obviate the sweeping ruling * * * that no sale of goods or services for business use is retail" (H. Conf. Rep., 95 Cong. Rec. 14931)—to clarify "the doubt [which] arose because the Administrator and the courts * * * ruled that the sale of goods and services for business use, as distinguished from family or household use, was not retail" (95 Cong. Rec. 12492).

Senator Holland stated explicitly that "[t]he only substantial difference between the Administrator and his recommendation and the amendment which we

propose is that we propose to do away with this artificial distinction between a retail sale on the one hand and a business sale on the other * * *" (95 Cong. Rec. 12498). He made plain that his amendment was not to affect existing rulings concerning manufacturing equipment (see, *e.g., id.* at 12495, 12504, 12505), and that he intended the amendment to have no effect upon the "other-than-retail" characterization of quantity sales at a discount price (see, *e.g., id.* at 12497, 12501, 12505). He made a particular point of emphasizing that "[t]here cannot be found in this amendment any matter which breaks down in the slightest the exclusion of interstate commerce or interstate business from the purview of the law," *id.* at 12495, also at 12483 and 12497. Senator Holland assured the Senate as to this amendment, as he later did with regard to the companion "laundry" exemption, that "There is no thought at all of bringing about by the so-called Holland amendment any condition under which the present application of the present law with reference to interstate business is changed in the slightest jot or tit[t]le" (*id.* at 12483, 12503).

D. The sponsors of the bill and the conferees were equally emphatic in their denial of any purpose of allowing individual industries to determine for themselves the scope of the exemption. The possibility that the statutory language "recognized as retail" and some loosely expressed comments of the sponsors might be interpreted as allowing each industry to decide the scope of its own exemption occurred to both the proponents and opponents of the 1949 Amendment. They sought clarification from the sponsors, who vigorously denied any such intent. For

example, each time that Senator Holland, the sponsor of the amendment in the Senate, was pressed as to the implications of the language of the amendment, he flatly denied that the amendment was intended to "throw the situation wide open for each industry to determine whether its sales shall be considered retail" or to make controlling the interpretation "given to a 'retail sale' by a trade association" (95 Cong. Rec. 12501, 12510). The report of a majority of the Senate conferees confirmed those denials, expressly stating that it was not intended that "the views of trade associations * * * [or] the interpretation of any interested group should be regarded as controlling" and that the ultimate characterization was to be made by the Administrator and the courts on the basis of many factors, giving due weight "to the actual practice in the industry" (*id.*, 14877). In short, prompted by the expressed fears of several Senators that an interpretation might be adopted which would, in effect, permit each industry to determine whether its sales were exempt, the authoritative spokesman for the legislation expressly disavowed any such intent.

## III

### NEITHER SALES OF TIRES AND TIRE SERVICES OF A CHARACTER DESIGNED FOR LARGE INTERSTATE TRUCK AND BUS CARRIERS OR HIGHWAY CONSTRUCTION EQUIPMENT, NOR SALES TO "FLEET" OPERATORS AT QUANTITY DISCOUNT PRICES, ARE "RETAIL SALES" WITHIN THE MEANING OF THE RETAIL EXEMPTION

If the industry's own use of the word is not the touchstone of exemption, the ultimate characteriza-

tion of a sale as "retail" or not necessarily becomes a question of law to be decided on the basis of the functional characteristics of the sale. The bare words of the statute provide little guidance as to which functional characteristics should be determinative; the meaning of the word "retail" as used by Congress, and hence the standards to be applied in making the characterization must be deduced from the legislative history of the provision. Cf. *Mitchell* v. *Kentucky Finance Co., supra*. That history shows, at a minimum, (A) that the sale of goods and services of a character sold primarily to businesses for use in interstate commerce or in the production of goods for commerce is wholly outside the retail concept and (B) that, even if the goods or services are of a character otherwise within the retail concept, sales at substantial quantity discounts must be characterized as "other than retail."

A. SALES OF TIRES AND TIRE SERVICES DESIGNED FOR LARGE INTERSTATE TRUCK AND BUS CARRIERS OR HIGHWAY CONSTRUCTION EQUIPMENT ARE WHOLLY OUTSIDE THE RETAIL CONCEPT

1. Prior to its amendment in 1949, the wording of the retail exemption was: "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1060, 1067. As this Court pointed out in *Roland Co.* v. *Walling*, 326 U.S. 657, 666–667, the purpose of the provision was to exempt those employers who were involved only in the *final* stage of distribution of goods to consumers, the stage which is "at the end of, or beyond, that 'flow of goods in com-

merce' which it is the purpose of the Act to reach.'" See, also, S. Rep. No. 884, 75th Cong., 1st Sess., p. 5. It was never part of the statutory purpose to exempt establishments supplying, in the initial or current stages of manufacturing, the materials and services "used by those who produce goods for interstate commerce"—for although such materials and services were to be "used" or "consumed" by the manufacturer-customers, they "remained actively in use in the production of the 'flow of goods in commerce'" (326 U.S. at 678). "The origin of this clause, § 13(a)(2), had nothing to do with establishments 'producing goods for [interstate] commerce.'" *Id.* at 667.

The sales and services involved in *Roland*—selling and servicing electrical equipment needed by manufacturers for the production of goods for commerce—

"'Without this clause such local establishments might find themselves technically covered by the Act, not because they were 'producing goods for [interstate] commerce,' but because, for example, they were retailing milk near a state line and, therefore, might be regarded as actually in interstate commerce when delivering retail sales of milk to local customers, all of whom were ultimate consumers of it for their personal use, but a small proportion of whom lived across the state line from the milk dealer. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571; *Phillips Co.* v. *Walling*, 324 U.S. 490, 497. Similarly, it was felt that without this exemption clause, the employees of a local merchant who purchased his goods from outside his State but retailed them all within his State to ultimate consumers across his counter, might, nevertheless, technically be covered by the Act as being actually 'in [interstate] commerce' because of his purchases, although his sales all might be at 'retail' and beyond the end of the 'flow of goods in commerce.' 83 Cong. Rec. 7393–7394, 7436–7438." *Roland Co.* v. *Walling*, 326 U.S. at 666–667.

did not come within the limited purpose of the exemption. To the contrary, "[t]o fail to cover in this Act the multitude of employees who are engaged in establishments like that of the petitioner and which supply the materials and services currently needed for the maintenance of productive machinery used by those who produce goods for interstate commerce would take the heart out of this Act. Savings resulting from substandard labor conditions would be reflected directly into competitive costs." 326 U.S. at 668.

The language of the *Roland* decision was not, however, limited to situations where the goods sold were manufacturing equipment designed for the production of other goods for commerce. In *dicta*, the Court also stated that the "retail" concept did not include sales made for business use but was limited to sales to private purchasers for personal use. Taken literally, the sale of identical goods, in identical quantities, on identical terms would be within the "retail" concept if the purchaser intended personal consumption but not if he intended to put the goods in a business use. The primary purpose of the 1949 Amendment, it seems clear, was to preclude making any such distinction among sales of goods and services sold on the same terms to both personal and business users.

The "clarification" was needed, the House conferees said, "to obviate the sweeping ruling * * * that no sale of goods or services for business use is retail" (H. Conf. Rep., 95 Cong. Rec. 14931). Senator Holland, the sponsor if the amendment in the Senate, likewise emphasized that the amendment was aimed only at

the "dicta" in the *Roland* opinion and its extension to all "business sales, no matter how small they may be and no matter how they may happen, in spite of the fact that they are completely intrastate" (95 Cong. Rec. 12497). The purpose was to make clear "that a business sale does not necessarily have to be a nonretail sale" (*id.*, 12495) and thus to "do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which, regardless of the size, and regardless of the fact that it is intrastate, can never be held to be a retail sale under" the existing rulings (*id.*, 12498).

Senator Holland assured the Senate that the actual result in the *Roland* case would "[d]efinitely not" be affected by the amendment. See, *e.g.*, *id.* at 12497, 12505. The reports of the conferees confirmed Senator Holland's assurances, expressly noting that the amendment was not intended to "exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods" (H. Conf. Rep., 95 Cong. Rec. 14932) or to "change the status of * * * establishments selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment held nonexempt in *Roland* * * *)" (95 Cong. Rec. 14877, Statement of Majority of Senate Conferees).[16]

[16] See also statement by the Chairman of the House Conferees' Committee in submitting the conference report (95 Cong. Rec. 14942): "[T]he reference to *Roland Electrical Co.* v. *Walling* * * * should not mislead anyone into concluding that the conferees intended to reverse or nullify that decision."

2. The reasoning of this Court's decision in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, determines conclusively that effect should be given to what the Conference Reports clearly state—that "the amendment * * * does not exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods * * *" (H. Cong. Rep., 95 Cong. Rec. 14932). This Congressional determination, like the decision not to exempt credit companies, was intended to be final "regardless of whether [such establishments] were thought of in [such] industry as engaged in 'retail' selling or servicing. 359 U.S. at 295. Here, as in *Kentucky Finance*, the controlling consideration is that "nothing in the debates or reports * * * suggests that Congress intended by the amendment to broaden the fields of business enterprise to which the exemption would apply." *Id.* at 294. Here, as there, "[a]ny residual doubt on this score is dispelled by the explicit and repeated statements of the sponsors of the amendatory legislation and in the House and Senate Reports * * *." *Id.* at 295. The Court's conclusion in *Kentucky Finance* is therefore controlling here. "In the light of the abundant pointed evidence that Congress did not intend that businesses like those of respondents be exempted from the overtime and record-keeping provisions of the statute by § 13(a)(2), [this Court] would not be justified in straining to bring respondents' activities within the literal words of the exemption." *Id.* at 296.

The reasons for denying an exemption to establishments "engaged in the sale and servicing of * * *

manufacturing equipment used in the production of goods" were clearly stated in the *Roland* case. The purpose of the retail exemption was to exempt those sales which occur "at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." 326 U.S. at 666. The exemption was never intended to eliminate coverage of enterprises furnishing the tools and services needed and designed for the production of goods for commerce. To fail to cover these enterprises "would take the heart out of this Act." 326 U.S. at 668.

This purpose admits of no distinction between the sale or servicing of "manufacturing equipment" to produce goods for later shipment in commerce and the sale or servicing of equipment designed to transport goods in interstate commerce. A truck-tractor-and-trailer rig specifically designed for long-distance hauling and sold to a common carrier is surely as much of an "industrial" piece of equipment as were the electric motors and wiring sold and maintained by the Roland Company. Just as the sale of "manufacturing equipment" for use in producing goods for commerce is wholly outside the retail concept, so must be the sale of an "over-the-road" highway transport to be used directly *in* commerce or, as here, of tires of a type and size suitable for use only on such a vehicle. Far from being at the "end" of the flow of goods in commerce, the function performed by both types of sale is prior to and continuously supportive of the interstate transportation itself. Certainly no less than the equipment and maintenance services sold by the Roland Company, the tires and mainte-

nance services supplied to such interstate transports "remain[ed] actively in use" in the very midst of the "'flow of goods in commerce.'" *Roland Electrical Co.* v. *Walling*, 326 U.S. at 666."

3. In this case, while the record does not show the precise amount of such sales, there is no question that a considerable proportion of the tires sold or serviced

" This Court's other pre-1949 decisions, for the same reason, held that the exemption did not reach establishments performing services in the very midst "of the stream of interstate commerce" (*Phillips* v. *Walling*, 324 U.S. 490, 497), or servicing the transportation equipment of an interstate carrier for use in interstate commerce, since such carrier "does not use [such] services for its own purposes as an ultimate consumer, beyond the end of the flow of goods in interstate commerce" (*Boutell* v. *Walling*, 327 U.S. 463, 467).

The relevance of the "interstate" or "local" character of the businesses served by the establishment to the policies underlying the "retail" exemption is reflected also in the special exemption for laundries (§ 13(a)(3)) that was added at the same time that the definition of "retail or service establishments" was adopted. That provision, thought to be necessary because there was no "retail concept" in the laundry business, is applicable only if more than 75% of the laundry's business is for "customers who are not engaged in a mining, manufacturing, transportation, or communications business" and was thus, on its face at least, cast in different terms from the definition of "retail" establishments. Yet Senator Holland explained the provision as being intended to give to laundries "the same relief from the *Roland* decision as the other retail and service establishments" and as involving "the same distinction * * * between work done for families and that done for the little village barbershop, beauty shop * * * or for any of the other purely local establishments" (95 Cong. Rec. 12503). The parallel seen between the two provisions by Senator Holland, who was the sponsor of both, obviously cannot exist if the "retail" concept was so expanded by the amendment as to include even sales of goods and services to, and specially adapted for use by, "mining, manufacturing, transportation, or communications" businesses.

by respondent were of a size and type suitable only for use by, and in fact sold to, businesses for use in interstate hauling or highway construction—*e.g.* the large truck tires sold to common carriers for use on long-distance "over-the-road" tractor-trailer transports hauling from 20,000 to 30,000 pounds payload (R. 248a), and the huge "earth-mover" tires (weighing about 1,000 pounds and priced anywhere from $950 to over $2,000) used on heavy equipment engaged in highway or dam construction (R. 259a–262a). Admittedly, 75% of the respondent's recapping and repair services, alone comprising 35% to 40% of its gross dollar volume of sales, is performed on tires for trucks or other heavy industrial equipment of the commercial customers (R. 48a, 265a). The furnishing or servicing of the "wheels" for such instrumentalities of commerce is no more a "retail" function, nor less vital a link in the midst of the flow of commerce, than is the furnishing or servicing of manufacturing equipment to be used in the production of goods for commerce."[11] See *Mitchell* v. *Lublin*, 358 U.S. 207; *Mitchell* v. *Vollmer*, 349 U.S. 427; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13; *Boutell* v. *Walling*, 327 U.S. 463. Such a function had never

[11] Indeed, the continuous tire maintenance service furnished by respondents for common carriers and other interstate truckers operating large fleets of trucks (*e.g.*, Southwestern Transportation Company, Gordon's Transport Company, and large wholesale distributors) for whom respondent provides daily, or on a regular basis, services at the customer's own place of business adapted to the needs of the business (79a–80a, 82a–83a, 109a–110a, 177a–178a), clearly constitutes production of goods "for commerce" as well as engagement "in commerce" within the meaning of the Act. (See *Alstate* and *Lublin*, *supra*).

previously been regarded as "retailing," and here, as in *Kentucky Finance,* the legislative history specifically disavowed any intent to change its status. The conclusion must be that the sale and servicing of such items, specifically adapted for use in industries engaged in commerce, is not within the "retail" concept.

B. TIRES AND SERVICES SOLD AT SUBSTANTIAL QUANTITY DISCOUNTS TO RESPONDENT'S GOVERNMENTAL AND COMMERCIAL "FLEET" CUSTOMERS ARE NOT "RECOGNIZED AS RETAIL" BECAUSE THEY ARE TREATED IN A WAY SIGNIFICANTLY DIFFERENT FROM THE TREATMENT ACCORDED ORDINARY RETAIL SALES

To the extent that the retail concept may be held applicable to the tires and services sold by respondent, a different question arises, *i.e.,* whether particular sales were made at "retail" or "wholesale." As we have shown, that determination cannot turn merely upon the way the industry chooses to define the word "retail," but must depend upon whether these sales were "recognized as retail" in the industry by being accorded substantially the same treatment given ordinary retail sales. This, in turn, depends upon the quantity and price at which the tires were sold—the two factors which the sponsors of the amendment thought should be of central importance.

In discussing the effects of the 1949 Amendment, Senator Holland repeatedly indicated his belief that sales at quantity discounts were not and could not be treated as "retail." He emphasized that the amendment dealt only with "sales which are so small in size that they cannot in any sense be called wholesale or cannot in any sense be subject to discounts because of large size" (95 Cong. Rec. 12495). Although he

thought it "impossible to distinguish" between admittedly retail sales "in small volume" to private purchasers and "sales to a local hotel or local laundry or to a local business building or city hall or courthouse or any other business place, when the sale is a part of the normal, everyday retail business, assuming that the sale is not made in such quantity that discounts are allowed" (*id.*, 12501), he immediately added: "Of course, if it is [*i.e.*, sold at quantity discounts], it comes in the category of wholesale sales" (*ibid.*). In later submitting a list of questions and answers showing the application of the amendment, Senator Holland again confirmed that view, stating that: "As a general rule, sales in quantities substantially larger than those to the average buyer and at a substantial discount are regarded as wholesale and not as retail" (*id.*, 12505).

In this case, the Administrator has adopted and published specific standards by which to determine when the discounts allowed on sales of tires or services to owners of fleets of motor vehicles or to governmental units are sufficient to constitute a recognition that that class of sales, because of the nature of the customer and the potential or actual volume of its purchases, is unlike the normal over-the-counter sales to other customers. Under these standards (set forth in the App. A, *infra*, pp. 43–46), sales of tires are treated as "other than retail" only when made to customers operating five or more vehicles and, even then, only when made at prices equivalent to or less than those charged on sales for resale—*i.e.*, only when the seller

treats the sales as similar to sales for resale.[19] Sales to governmental units are treated as "wholesale" only if made "pursuant to a formal invitation to bid"—a method of purchase which is generally used only for large-volume purchases at special discount prices. Sales of services and repair work to owners of fleets of vehicles are treated as "wholesale" only when made "at a price below the prevailing retail price" to the owner of five or more vehicles.[20] These standards are well within those supported by the history of the Act and are, if anything, overly generous to tire dealers.

Respondent ignored the Administrator's standards and offered no evidence on the percentage of its sales of tires and services which were made to such "wholesale" customers, although "it is clear that Congress intended that 'any employer who asserts that his establishment is exempt must assume the burden of proving that at least 75 percent of his sales are recognized in his industry as retail.' " *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 393, quoting the remarks of Senator Holland; see, also, 95 Cong. Rec. 14877 (Report of

[19] If the establishment makes no sales of passenger tires for resale, the wholesale price is considered that which is typically charged in the area for such sales. If, in the case of truck tires, the establishment makes no sales for resale, the wholesale price is that charged fleet accounts operating ten or more commercial vehicles. App. A, *infra*, p. 44.

[20] The Wage and Hour Administrator's Interpretative Bulletin also classifies as "other than retail," sales made to "national accounts," *i.e.*, sales in which delivery is made by a local tire dealer under a centralized pricing arrangement between the customer's national office and the tire manufacturer. Since respondent's "national account" sales, added to the sales for resale, would not by themselves exceed the 25% tolerance, they would not be determinative of the exemption issue in the instant case.

Majority of Senate Conferees) and 95 Cong. Rec. 11004, 11116, 12502. Respondent is thus not entitled to the exemption if, as we contend, sales to such customers at "wholesale" discounts are not retail.[21]

## CONCLUSION

Under the standards outlined above respondent's non-retail sales would clearly exceed 25% of its total annual dollar volume of sales, and it therefore fails

[21] The reason for respondent's failure to attempt to meet its burden of proof may be found in the record. The Labor Department's wage-hour investigator testified at length as to the character of respondent's sales. He applied the Administrator's standards rigorously except for also treating as wholesale "fleet" sales certain sales at discount prices to large-volume, governmental purchasers, regardless of whether the sales were made "pursuant to a formal invitation to bid." Even the incomplete information available to him (based on respondent's records, plus information obtained from respondent's customers) showed that respondent's "wholesale" sales under these standards and its sales-for-resale together exceeded 25% of its total annual dollar-volume of sales. R. 34, 37, 126–127, 192, 195, 238, 789 (sales for resale); R. 131–132, 135, 154–156, 160, 190–192, 196–202, 208 (fleet sales at wholesale prices); R. 132–135, 144–148, 156–158, 195, 789 (sales of services to "fleets" at discount prices); R. 158–160, 189–190, 193, 195, 199–200, 789 (sales pursuant to formal invitation to bid); see, also, "national account" sales (n. 20, p. 40, *supra*), R. 128–130, 141–144, 150–151, 203–207, 227–228, 789. (Small "a" omitted from record references.)

to qualify for the "retail" exemption. Accordingly, the judgment below should be reversed.

Respectfully submitted.

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AUGUST 1965.

# APPENDIX A

## PLAINTIFF'S EXHIBIT 6

## TITLE 29—LABOR

### CHAPTER V—WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

### PART 779—RETAIL OR SERVICE ESTABLISHMENT AND RELATED EXEMPTIONS

#### AUTOMOTIVE TIRE TRADE

§ 779.37 *Application of the 13(a)(2) and 13(a)(4) exemptions to the automotive tire trade.*

(a) It is the purpose of this section to show generally how the 13(a)(2) exemption applies to establishments engaged in the sale of tires, tubes, accessories and repair services on tires, and how the 13(a)(4) exemption applies to establishments engaged in retreading and recapping tires.

(b) In applying the tests of the exemption under section 13(a)(2), all sales of tires, tubes, accessories and tire repair services, including retreading and recapping, are recognized as retail in the industry, except those set out in subparagraphs (1) to (6) of this paragraph:

(1) Sales for resale: For example, sales of tires, tubes, accessories or services to garages, service stations, repair shops, tire dealers and automobile dealers, to be sold or to be used in reconditioning vehicles for sale are sales for resale. (It should be noted that in determining whether the establishment meets the

tests of the exemption, section 13(a)(2) of the Act treats all sales for resale the same as sales which are not recognized as retail in the particular industry.)

(2) Sales made pursuant to a formal invitation to bid: Such sales are made under a procedure involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications. Sales to the Federal, state, and local governments are typically made in this manner.

(3) Sales to "national accounts" as known in the trade, this is, sales where delivery is made by the local tire dealer under a centralized pricing arrangement between the customer's national office and the the tire manufacturer; payment may be made either to the local dealer or direct to the tire manufacturer under a centralized billing arrangement with the customer's national office.

(4) Sales to fleet accounts at wholesale prices: As used in this section, a "fleet account" is a customer operating five or more automobiles or trucks for business purposes. Wholesale prices for tires, tubes, and accessories are prices equivalent to, or less than, those typically charged on sales for resale. If the establishment makes no sales of passenger car tires for resale, the wholesale price of such tires will be taken to be the price typically charged in the area on sales of passenger car tires for resale. If the establishment makes no sales of truck tires for resale, the wholesale price of such tires will be taken to be the price charged by the establishment on sales of truck tires to fleet accounts operating 10 or more commercial vehicles, or if the establishment makes no such sales, the wholesale price will be taken to be the price typically charged in the area on sales of truck tires to fleet accounts operating 10 or more commercial vehicles.

(5) Sales of a tire rental service on a mileage basis known in the trade as "mileage contracts": This is a leasing arrangement under which a tire dealer agrees to provide and maintain tires or tubes for motor vehicles of a fleet account.

(6) Sales of servicing and repair work performed under a fleet maintenance arrangement on tires for trucks and other automotive vehicles whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price.

(c) If more than 50 percent of the establishment's annual dollar volume of sales is made within the State in which the establishment is located and if 75 percent or more of the establishment's annual dollar volume of sales consists of sales which are not for resale and are recognized as retail sales of goods or services in the industry, the exemption under section 13(a)(2) will apply to all employees employed by the establishment except those employees who are engaged in the recapping or retreading of tires for sale or in other manufacturing or processing of goods for sale.

(d) The retreading or recapping of a customer's tires constitutes a service which may be recognized as retail in the industry in accordance with the above tests. However, where the recapping or retreading work is performed on tires which the establishment expects to sell in their reconditioned form, such activities are not performed as a service for a customer but constitute manufacturing goods for sale. Employees performing such work may be exempt only if they are employed by the establishment and all of the following tests of the section 13(a)(4) exemption are met:

(1) The establishment must qualify as an exempt retail establishment under section 13(a)(2), as explained above.

(2) More than 85 percent of the establishment's annual dollar volume of sales of the tires which it retreads or recaps for sale must be made within the State in which the establishment is located.

(3) The retreaded or recapped tires which the establishment makes or processes must be made or processed at the establishment which sells them.

(4) The establishment must be recognized as a retail establishment in the industry.

(e) An establishment engaged in retreading or recapping of tires is recognized as a retail establishment in the industry if it does not derive from the sale of tires retreaded and recapped for sale more than 50 percent of the annual dollar volume of its sales resulting from its retreading and recapping operations.

Signed at Washington, D.C., this 16th day of February 1959.

CLARENCE T. LUNDQUIST,
*Administrator.*

Filed February 24, 1959; 8:46 a.m.
Published in Federal Register February 25, 1959 (24 F.R. 1362), effective March 28, 1959.

# APPENDIX B

## STATUTES INVOLVED

Sections 6, 7, and 13 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. 206, 207, and 213) provide in relevant part as follows:

SEC. 6. MINIMUM WAGE

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1.15 an hour during the first two years from the effective date of the Fair Labor Standards Amendments of 1961, and not less than $1.25 an hour thereafter, except as otherwise provided in this section.

* * * * *

SEC. 7. MAXIMUM HOURS

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; * * *

* * * * *

SEC. 13. EXEMPTIONS

(a) The provisions of sections 6 and 7 shall not apply with respect to—

* * * * *

(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—

(i) is not in an enterprise described in section 3(s) [*i.e.*, an enterprise with gross sales exceeding $1,000,000], * * *

* * * * *

A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * *

* * * * *

(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *

* * * * *

Section 13(a)(2) as worded prior to the 1949 Amendment:

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * * [52 Stat. 1067].

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No. 31.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

W. WILLARD WIRTZ, Secretary of Labor,
Petitioner,

v.

STEEPLETON GENERAL TIRE COMPANY, INC., and
A. E. STEEPLETON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

# BRIEF FOR THE RESPONDENTS.

## QUESTION PRESENTED.

Is the phrase "recognized as retail sales or services in the particular industry" in Section 13 (a) (2) and (4) of the Fair Labor Standards Act to be construed and applied according to theoretical, text-book criteria rejected by Congress or is that phrase to be applied according to the habits, customs and practices in the particular industry as it was in this case by the district court and by the court of appeals?

## STATEMENT OF THE CASE.

Petitioner's Statement is inaccurate; it omits facts the courts below considered to be determinative in this case. Facts material to the consideration of the question presented are in the findings of fact by the district court (R. 32a-37a). Testimony supporting the more salient of those findings is succinctly paraphrased in the opinion of the court of appeals, 330 F. 2d 804, 807-808.

## ARGUMENT.

### Summary.

This case should determine whether or not the Wage-Hour Administrator will be permitted to ignore in the future, as in the past and present, the plain intent of Congress in 1949 when Section 13 (a) (2) and (4) of the Fair Labor Standards Act were enacted. In this case, as in many others under those subsections, the petitioner's experts classified sales in strict accordance with the business use test, long ago held by this Court to have been rendered inapplicable under those sections by Congress in 1949, and supported their classifications by reference to text books or statistical lore repeatedly held by courts of appeal to be immaterial to a determination of the recognition in the particular industry test.

The full debate and reports upon the 1949 amendments to the Fair Labor Standards Act amply supply the legislative intent when Section 13 (a) (2) and (4) were enacted. In order to accomplish the Administrator's persistent program to eliminate the exemption for retailers, petitioner in this case argues that a further limitation upon the scope of Section 13 (a) (2), not actually mentioned in Congress until 1957, when it met with no success, was somehow an undisclosed part of the legislative consciousness in 1949. What was disclosed and in fact plainly said as reflecting the legislative purpose in 1949 is not and cannot be relied upon by petitioner if the Administrator's purpose is to be served.

There is no dispute in this record but that the recognition of retail sales in the particular industry involved in this case includes all sales not for resale. There is no dispute but that the Administrator was fully advised of this uniform recognition in all segments of this particular

industry before his staff devised the Interpretative Bulletin which the court below found to be contrary to the customary habits and practices in this particular industry from overwhelming evidence and further found such habits and practices not to be of recent origin, not to have been adopted to avoid wage-hour law coverage, but to have been traditional and to have existed long before 1949. This should sufficiently support an exemption under Section 13 (a) (2) and (4).

## I. Construction of the Phrase "Recognized as Retail—in the Particular Industry" Presents An Issue of Fact to Be Decided By Reference to Industry Sources.

The "primary issue in this case" which petitioner chooses to argue (Brief for the Petitioner, hereinafter "Brief", p. 15) is whether the application of Section 13 (a) (2) and (4) of the Fair Labor Standards Act presents a question of law or fact. It is a question of fact to be determined by reference to the habits and practices in the particular industry. One of the proponents of the 1949 amendment at issue here stated:

> "Hardly an industry can be found in which the question of what is retail and what is wholesale has not been settled for years. **It is a question of fact just as much as any other question of fact.**" (Emphasis added.)
>
> (95 Cong. Rec. 12516.)

The actual "primary issue" in this case is not specifically stated in said Brief and certainly is not the resolution of the test under the 1949 amendment as an issue of law or fact. Petitioner's primary concern is that the 1949 amendments require the Wage and Hour Administrator to ascertain and apply the exemption under Section 13 (a) (2) and (4) according to habits and practices in the particular industry. During the debate upon these amend-

ments proponents observed that the Administrator could discover the recognition of "retail" in any industry "by honest search" and "give effect to it" and that, without search:

> "any sale or service to a private consumer, businessman who does not purchase to resell, or farmer **will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service.**" (Emphasis added.)
>
> (95 Cong. Rec. 12502,
>
> see also 95 Cong. Rec. 11003.)

The House Conference Report on these 1949 amendments reaffirms the mandatory nature of the industry recognition test upon the Administrator:

> "Under this test any sale or service, regardless of the type of customer, **will have to be treated by the Administrator and courts as a retail sale or service,** so long as such sale or service is recognized in the particular industry as a retail sale or service." (Emphasis added.)
>
> (95 Cong. Rec. 14932.)

The Administrator's staff when devising the Interpretative Bulletin (Plaintiff's Exhibit 6) and otherwise directing the application of the Section 13 (a) (2) and (4) to respondents and other businesses (R. 771a-772a) concluded from the legislative history of the 1949 amendments that ". . . we weren't to accept the contention of the industry and let them make their own definition or decide for themselves what was at retail and what was at wholesale" (R. 772a).

Petitioner's refusal to accept the 1949 legislative mandate that the "habits and practices" in a particular in-

dustry (95 Cong. Rec. 12510) were to be ascertained by the Administrator and then applied under the 1949 amendments, has been expressed in several ways. An early expression of this refusal was the so-called Report of the majority of Senate Conferees, frequently cited in petitioner's Brief and in Plaintiff's Exhibit 6, the Interpretative Bulletin in which the Administrator construed and applied the 1949 amendments to Section 13 (a) (2) and (4). As described by Senator Taft, without contradiction since by anyone, the Administrator's attorneys prepared this Report as part of the Administrator's effort to nullify the 1949 amendments and in it confirmed the very interpretations of coverage by the Fair Labor Standards Act which the 1949 amendments reversed (95 Cong. Rec. 14880). A later expression of the Administrator's refusal to accept the clear legislative mandate under the 1949 amendments to give effect to the particular industry's recognition of the term "retail", was his staff's decision that the legislative history of the 1949 amendments made an industry's definition of "retail" unacceptable for purposes of administering the Section 13 (a) (2) and (4) exemption (R. 772a). The staff decision, as expressed in its publication (plaintiff's Exhibit 6), was to apply the business use test and other criteria from theoretical on textbook sources to define and delimit "retail" sales for purposes of Section 13 (a) (2) and (4) exemption. The business use test and theoretical sources had been adopted and recommended by the Administrator during and before 1948 (see e. g. excerpts from the Administrator's 1948 annual report, 95 Cong. Rec. 12493-4). These criteria were criticized by the sponsors of the industry recognition test in 1949 as being "wrong", "artificial", "ignor(ing) the realities of local business" (95 Cong. Rec. A4569-70), and as "silly, illusory, and ridiculous" criteria (95 Cong. Rec. 12494-5). "To get away from that kind of interpretation" (ibid.)

these sponsors proposed and Congress passed the industry recognition test. This case evidences the continuing effort of the Administrator to apply the business use test and criteria from theoretical or governmental sources when defining "retail" for wage-hour law purposes. Petitioner's experts in this case followed that pattern exclusively (R. 700a, 735a, 737a, 765a-766a, 767a, 769a, 770a, 806a-811a, 813a, 817a). As noted in the opinion for the Sixth Circuit Court of Appeals in this case, petitioner's professorial experts "cited no authority from anyone connected with the tire industry in support of their definitions or classifications" (330 F. 2d 808). The latest implementation of the Administrator's stubborn refusal to give up the business use test and theoretical criteria as devices to restrict exemption from wage-hour law under the 1949 amendments is the argument in petitioner's brief that the industry recognition test involves an issue of law. There is no support for that contention in the legislative history of the 1949 amendments. The industry recognition test was described by its proponents as presenting solely a fact question (95 Cong. Rec. 12516) and was enacted by both Houses in the form so described (95 Cong. Rec. 12495, 12499, 14931). The industry recognition test has been explicitly construed as presenting an issue of fact by a circuit court of appeals on the only occasion, so far as we can ascertain, that any explicit holding on this point was made, **Rachal v. Allen**, 321 F. 2d 449, 451; circuit courts of appeal have repeatedly treated the industry recognition test as a fact issue to be decided upon the testimony of experienced persons in the particular industry, **Wirtz v. Modern Trashmoval, Inc.**, 323 F. 2d 451, cert. den. 377 U. S. 925; **Mitchell v. City Ice Co.**, 273 F. 2d 560; **Mitchell v. T. F. Taylor Fertilizer Works**, 233 F. 2d 284, and **Boisseau v. Mitchell**, 218 F. 2d 734. The legislative history of the 1949 amendments directs the sources to be analyzed in making this

factual determination: trade associations are a "quite persuasive" source (95 Cong. Rec. 12501); definitions for sales tax purposes can be relied upon as promulgated by persons who "are supposed to know the difference between wholesalers and retailers" (Id., at 12502); competitors in the same industry and their employees (Id., at A4570, 12502) and other local retailers of the same products (Id., at 12497) are examples of knowledgeable industry sources on this issue. Respondents' witnesses were from these categories of informed persons in the tire industry. Petitioner's leading counsel at the trial of this case, after hearing only some of them, conceded that the industry's position is not disputed in this record (R. 282a) and petitioner's Brief in this Court makes the same concessions as to the tire industry's usage (Brief, p. 20).

## II. The Phrase "The Sale and Servicing of Manufacturing Machinery and Manufacturing Equipment Used in the Production of Goods" Does Not Encompass Sales and Services to Carriers or "Commercial" Sales.

Petitioner contends that the above-quoted phrase from the statement of the Managers on the Part of the House which accompanied the Conference Report on the 1949 amendments of the Fair Labor Standards Act (95 Cong. Rec. 14932) expressed legislative intent to treat sales to customers engaged in the transportation business and "commercial" sales as transactions which, like sales of manufacturing machinery and equipment, could not qualify as retail sales under the Section 13 (a) (2) and (4) exemption.

Petitioner contends that Congress in 1949 intended, by placing sales to businesses in the transportation industry and "commercial" sales outside the retail concept, to make such transactions ineligible for exemption under

the 1949 amendments. If that contention were sound, no less a personage than John F. Kennedy together with one no less expert on labor legislation than Wayne Morse made prodigal use of the Senate's time during 1957. The late President Kennedy, as Senator, in 1957 offered the "Kennedy Bill to Amend the Fair Labor Standards Act of 1938, as amended, . . ." (103 Cong. Rec. 5440) in part to modify or eliminate exemptions from wage-hour coverage. One provision of this Bill would have amended the 1949 enactment of Section 13 (a) (2) by redefining "retail and service establishments" to mean those making not more than 25 percent of their sales "for resale or to customers engaged in mining, manufacturing, **transportation, commercial** or communications business" (emphasis added) (Id., at 5441). Senator Morse during the same year offered his bill entitled "Fair Labor Standards Amendments of 1957" (103 Cong. Rec. 2099) which would also have adopted the proviso enacted in 1949 as part of Section 13 (a) (3) to re-define a "retail or service establishment" under Section 13 (a) (2) to mean one "not more than 25 percentum of whose annual dollar volume of sales of goods or services (or both) is for resale or is made to customers who are engaged in a mining, manufacturing, **transportation, commercial** or communications business" (emphasis added) (Id., at 2108). The late President Kennedy was chairman in 1957 of the Senate Sub-committee on Labor, had served on that sub-committee during years prior to 1957 while he was a senator and in 1949 had been a member of the House Committee on Education and Labor when it acted upon the 1949 amendments. If, as petitioner argues, Congress in 1949 intended to place sales to customers engaged in the transportation business and "commercial" sales outside the retail concept, respondents' small wonder is why Congress did not expressly do so by using the proviso enacted in 1949 as part of Section 13 (a) (3), and respondents' greater

wonder is why two outstanding and active statesmen in the field of labor legislation during this period were not apprised of this 1949 Congressional intent by 1957. There would seem to be only two possible answers. One is that Senators Kennedy and Morse in 1957 offered further restrictions upon the exemption of retailers from wage-hour law coverage as enacted in 1949, which both of them knew to be needless and redundant—and this answer should be acceptable to no one. The other and, respondents submit, correct answer is that Congress in 1949 did not adopt the restriction from Section 13 (a) (3), excluding sales to carriers and "commercial" sales, to limit the retail concept under Section 13 (a) (2) because Congress did not in 1949 or ever intend to classify sales to customers in the transportation business and "commercial" sales as being the same as sales of manufacturing machinery and equipment used in the production of goods, therefore outside the retail concept. Not only did Congress not intend in 1949 to exclude sales to carriers or "commercial" sales from the retail concept, but, since neither the Kennedy Bill (S. 1853) nor Senator Morse's bill (S. 1267) to accomplish that exclusion appears to have even been reported out of the committee which Senator Kennedy then served as chairman, apparently there was not wide acceptance of that exclusion when it was proposed for the first time in 1957. It is significant that had Congress in 1949 or at any time thereafter intended to exclude sales to carriers or "commercial" sales from the retail concept under Section 13 (a) (2), the proviso stating that intention could have been adopted from Section 13 (a) (3) as enacted in 1949. The failure to use this same proviso in 1949 under Section 13 (a) (2); the apparent disinterest in this further limitation on the exemption of retailers under Section 13 (a) (2) using the proviso from Section 13 (a) (3) when offered in that form by Senators Kennedy and Morse in 1957; and the

failure to exclude sales to carriers and "commercial" sales as outside the retail concept when Congress in 1961 enacted Section 3 (s) as a further limitation upon retailers exempt from wage-hour law coverage under Section 13 (a) (2); all indicate the invalidity of petitioner's argument on this point.

Respondents' business is not only within the retail concept, its pattern of operation exemplifies the typical retailer which Congress in 1949 exempted from wage-hour law coverage. More than 50 percent of its sales are made in Tennessee, where it is located (Findings and conclusion, R. 32 a, et seq.; not controverted by petitioner). Less than 25 percent of its total sales were for resale (petitioner's Brief, p. 12) so that more than 75 percent of its total sales were "to ultimate consumers" (95 Cong. Rec. 12500). It has many of the features of "repair garages, filling stations and the like" (95 Cong. Rec. 11003) whose services, as repeatedly emphasized during the debate over the 1949 amendments, "whether rendered to private householders or to business customers, will be retail so long as they are regarded as retail services in such trade" (Ibid). Respondents' service department "remains open 12 hours a day and provides round-the-clock emergency call service" and it adapts its services "to the customers' special needs" (Petitioner's Brief, p. 5). It is characteristic that "retail and service businesses operate on a 6-day work week because they are necessarily adapted to the living requirements and buying habits of their communities" (95 Cong. Rec. 12492). Congress in 1949 exempted such retailers from wage and hour regulations because their service function is essential to their customers and could not be performed on the same basis if minimum wage and maximum hour provisions of the law applied to them:

> "No rational distinction can be drawn between establishments selling to business customers and those

selling to household users, for purposes of the exemption, because, first, generally the same establishment will sell to both types of users; and, second, even where one establishment is selling to business users exclusively and another to household users only, both are local businesses and would have equal difficulty in conforming to national wage and hour standards, both are located in the same community, and both draw employees from the same labor pool and have similar working conditions."

(95 Cong. Rec. 12498).

Some of respondents' customers are in interstate commerce; under the 1949 amendments "it is immaterial that the sales . . . are made to customers who are engaged in interstate commerce or in the production of goods for interstate commerce" (95 Cong. Rec. 14931). The matter of quantity discounts is also to be determined by the usages and practices in the particular industry so that "**a wholesale transaction would be one in such quantities as to be beyond the industry's standards for retail sales** and when the purchases are made in such quantities as to entitle the purchaser to discounts such as are allowed in wholesale transactions" (emphasis added) (Id., at 12501). The tire industry's standard for a wholesale sale is a sale for resale (Petitioner's Brief, p. 20). Sales by respondents to fleet owners and the like are in quantities no larger than the sales to small businesses or individuals (R. 250a-252a); the prices are the same to all customers (R. 82a, 83a, 85a-86a). The use of particular salesmen by many tire retailers to learn about and serve business accounts and the necessity for separate accounting control records for those accounts (R. 345a, 470a, 488a) is noted by petitioner (Brief, pp. 6-7). No strict line of demarcation is maintained among respondents' salesmen (R. 51a, 63a, 106a). The argument by petitioner based on the segregated accounting controls over "commercial" sales is

without merit because the same accounting records reflect similar segregation of budget or installment sales by the same tire stores for the same control purposes (Exhibit K-de Bruin; Exhibit 1-Hindersheid; Exhibit 5-Curry). Those budget and installment sales are plainly retail sales, yet are given the same treatment which petitioner contends makes wholesale transactions out of "commercial" sales.

### III. Repetition of Petitioner's Contentions.

Petitioner's contentions that the opinions of the courts below in this case turn upon "words" or "labels" and his reliance upon nursery rhymes in support thereof are virtually verbatim repetition of parts of his petition for a writ of certiorari; answer thereto in respondents' reply brief will not be repeated here.

## CONCLUSION.

The Administrator's tenacious insistence upon the business use test and the criteria of academics and doctrinaires to restrict the exemption under Section 13 (a) (2) and (4) in derogation of plainly expressed legislative intent should be stopped by this Court. The plainly expressed legislative intent regarding that exemption was applied in this case by the courts below. The judgment below should be affirmed.

Respectfully submitted,

/s/ .....
LUCIUS E. BURCH, JR.,

/s/ .....
TOM MITCHELL, JR.,
Attorneys for Respondents.

# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 31

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

*v.*

STEEPLETON GENERAL TIRE COMPANY, INC., AND A. E. STEEPLETON

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE SECRETARY OF LABOR

This short reply is submitted in answer to respondent's heavy reliance on some 1957 unenacted legislative proposals (Resp. br. pp. 9–11), as bearing on the legislative intent of the 1949 amendment to the Act's "retail" exemption. Respondent's argument is that since the sponsors of the 1957 proposals were also members of Congress at the time of enactment of the 1949 amendment, the inference to be drawn is that the 1949 Congress did not intend to exclude from the "retail" classification any of the types of sales which the 1957 proposals would have expressly excluded, for if



795-053—65

the 1949 legislative intent had been otherwise, there would have been no need for Senators Kennedy and Morse to waste the Senate's time by introducing the 1957 proposals (Resp. br. p. 9).

The conclusive answer to respondent's argument is found in this Court's repeated rulings that subsequent unenacted legislative proposals afford no tenable basis for inferences of the legislative intent of existing legislation. *E.g.*, among the more recent cases, *United States* v. *Wise*, 370 U.S. 405, 411; *United States* v. *Price*, 361 U.S. 304, 310, 313; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348–349; *Waterman Steamship Corp.* v. *United States*, 381 U.S. 252, 269. As stated by the Court in dismissing the same kind of argument in the *Wise* case: "However, statutes are construed by the courts with reference to the circumstances existing at the time of the passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here [citing numerous decisions]" 370 U.S. at 411.[1]

[1] Indeed, even where a subsequent Congress has passed a proposal clearly showing an intent different from that attributed to a current statute by its administrators and the courts (enactment having failed only because of presidential veto), this Court has held such legislative action without significance as a basis for inferring the intent of the earlier Congress, on the ground that "the abortive action of the subsequent Congress 'would not supplant the contemporaneous intent of the Congress which enacted the * * * Act.'" *Waterman Steamship Corp.*, *supra*, 381 U.S. at 269; *Fogarty* v. *United States*, 340 U.S. 8, 14.

The inference which respondent in the instant case seeks to draw from the 1957 legislative proposals rests on an even more tenuous basis than did the contentions advanced in the above cited cases. For the particular proposal on which respondent relies was only one clause of comprehensive bills which included numerous proposed amendments designed to expand the Act's coverage and limit its exemptions. Congress' "apparent disinterest" in the enactment of these entire bills (see Resp. br. p. 10)—which were not even reported out of committee, much less subjected to Congressional consideration or debate of specific features—"is no evidence that this single feature had special significance" and assuredly "cannot be taken to be a specific rejection of each and every feature" of the "entire bill." See *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 265.

Even had there been a specific rejection of the proposed amendment to the "retail" exemption, the terms of that proposal so differed in scope and effect from the government's interpretation of the 1949 amendment as to preclude any inference of Congressional disagreement with the government's view. The proposed redefinition in the 1957 bills would have eliminated the "industry recognition" clause and would have expressly excluded from the "retail" classification *all* sales to customers engaged in *any* "commercial" business, in addition to sales to customers engaged in a "mining, manufacturing, transportation, or communications business" (cf. Section 13(a)(3), quoted in Petitioner's main br. p. 36, fn. 17) whether

or not the goods and services were of a distinctively industrial or commercial type and regardless of the close similarity of the sales, in kind, price, quantity and other characteristics, to those normally made for personal use (cf. Pet. main br., Point III, pp. 29–39). In short, the effect of the proposed redefinition would have been to repeal the 1949 amendment and to enact expressly the most sweeping implications of the "business use" test, *i.e.*, the "artificial distinction[s]" at which the 1949 amendment was aimed (*id.* pp. 22–23). It is evident, we submit, that rejection of such a sweeping proposal, far from being indicative of a different view, would be entirely consistent with full endorsement of the government's interpretation of the present law.

Finally, the weakness of respondent's argument from subsequent legislative proposals—like its reliance simply on a few isolated loosely expressed comments made at the time of enactment of the 1949 amendment (see statements quoted in Resp. br. pp. 4–5)—is shown by the result of its reasoning: respondent is relegated to an interpretation of the exemption which is devoid of rational relationship or relevance to any statutory purpose and which would reduce the statute to such an absurdity as to raise serious doubts of its constitutionality (see Pet. main br., Point I, pp. 17–22).

Respondent rests its case on what it terms a "clear legislative mandate" to give effect to the particular industry's "recognition of the *term* 'retail' " by accepting "an industry's *definition* of 'retail' " (Resp.

br. p. 6, emphasis added)—*i.e.*, unmistakably equating "recognition" with "definition" or terminology.[2] Although respondent's brief, like the opinion of the court below, makes some references to "habits and practices" (br. pp. 4, 5), it is evident both from its brief and the testimony of its witnesses that the only "habit" or "practice" respondent and the courts below consider relevant is the "practice" of terminology or labelling (see Pet. main br. p. 11–12). Indeed, the very definition which respondent claims to be determinative of the exemption in the tire industry, by its terms, negates the relevance of any and all meaningful functional habits and practices. As respondent and its witnesses have persistently emphasized—and as the trial court found—under the industry's sweeping "not for resale" definition, "the sole distinction is whether or not it is a sale for resale" (R. 611a), "regardless of the character or identity of the purchaser, the use to which tires may be put, the quantities purchased or the price paid" (trial court's fdg. 9, R. 34a), "regardless of * * * any other factor" or "anything else" (*e.g.*, R. 235a, 303a, 467a–468a. 568a–569a).

It is significant, we submit, that respondent's brief makes no attempt to deny or dispute that the necessary implication and effect of its interpretation of the exemption is to permit industry members to decide

[2] Respondent's construction of "recognition" as synonymous with "definition" is also evident from their erroneous statement that "[t]here is no dispute * * * that the recognition of retail sales in the particular industry involved in this case includes all sales not for resale" (br. p. 3).

for themselves whether they shall be subject to the Act, thus depriving the statute of rational content. Nor does respondent make any pretense of reconciling its interpretation with this Court's *Kentucky Finance* decision or the 1949 legislative history which dictated that decision (see Pet. main br. pp. 26–28) or with the explicit and repeated legislative statements emphatically denying the very intent respondent and the courts below have attributed to the 1949 Congress (*id.* pp. 28–29).

Respectfully submitted.

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DECEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

# SUPREME COURT OF THE UNITED STATES

Nos. 30 AND 31.—OCTOBER TERM, 1965.

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|---|---|
| Idaho Sheet Metal Works, Inc., Petitioner, v. W. Willard Wirtz, Secretary of Labor. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. |
| W. Willard Wirtz, Secretary of Labor, Petitioner, v. Steepleton General Tire Company, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. |

[February 24, 1966.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

The common question presented by these two cases is the meaning of the phrase "retail or service establishment" as that language is used in the exemptive provisions of the federal wage and hour statute. We first set forth the statute and describe the two cases before us, then examine the history and content of the exempting clause, and finally apply the resulting analysis to the facts of each case.

## I.

The Fair Labor Standards Act of 1938 enacted a comprehensive scheme providing for minimum wages and overtime pay for workers "engaged in" or "in the production of goods for" interstate and foreign commerce.[1]

[1] 52 Stat. 1060, as amended, 29 U. S. C. §§ 201–219 (1964 ed.). Sections 6–7, codified as §§ 206–207, respectively cover minimum wages and overtime pay. The commerce coverage of the Act, through a special definition of "production," is drawn in generous terms. See § 3 (j), codified as § 203 (j).

Among other exemptions, Congress by § 13 (a)(2) of the Act has excluded from the statute's wage and hour protections those employees working for certain "retail or service establishments." [2] To qualify for this exemption in its present form, an establishment must meet three tests: *first*, it must make more than 50% of its annual dollar volume of sales of goods or services within the State; [3] *second*, the establishment must meet one of four tests designated "(i)–(iv)," chiefly designed to prevent most very large employers from enjoying the exemption; [4] *third*, it must be a "retail or service establishment." Regarding this third requirement—which is the focus of this decision—§ 13 (a)(2) states that "[a]

---

[2] 52 Stat. 1067, as amended, 29 U. S. C. § 213 (a)(2) (1964 ed.). The section provides that the minimum wage and overtime pay provisions of the Act shall not apply to:

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—

". . . [meets one of four tests, designated '(i)–(iv)' and framed with reference to another section of the Act].

"A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

[3] This requirement has been met by the companies in this case. Section 13 (a)(4) of the Act, added in 1949 by 63 Stat. 917, 29 U. S. C. § 213 (a)(4) (1964 ed.), provides that an establishment that makes or processes the goods it sells may qualify as exempt if it meets the tests of § 13 (a)(2) and "is recognized as a retail establishment in the particular industry" and makes more than 85% of its annual dollar volume of sales of such goods within the State. So far as the companies in this case may be deemed to make or process the goods they sell, the Government is apparently satisfied that the added requirements of § 13 (a)(4) have been met or at least is unwilling to rely upon them.

[4] These four tests were added to § 13 (a)(2) in 1961 by 75 Stat. 71. The Government has not suggested that this amendment would disqualify either of the companies in the present case.

'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

Of the cases before us, the first one, No. 30, stems from two consolidated actions brought by the Secretary of Labor against Idaho Sheet Metal Works, Inc. (Idaho Sheet). By one action the Secretary sought to enjoin future disregard of the Act's overtime provisions, and by the other he sought to collect on behalf of one employee unpaid overtime compensation for a period during the year 1960. See §§ 15–17, 52 Stat. 1068, as amended, 29 U. S. C. §§ 215–217 (1964 ed.). The ensuing litigation established that Idaho Sheet operates a plant in Burley, Idaho, where it employs about 12 workers to fabricate, install, and maintain sheet metal products. Many articles are sold to individuals, farmers, and local merchants, the plant has display racks to show its wares, and about 60% of sales in number are said to be to "the general public" as opposed to industrial customers. About 83% of the gross income, however, is derived from metal work done on equipment used by five potato processing companies which dehydrate and freeze the potatoes for interstate shipment.

For its defense, Idaho Sheet denied its workers were engaged in or producing goods for interstate commerce. It also claimed to be an exempt retail or service establishment, adducing proof that over 75% of its dollar volume of sales were not for resale and that its officials and salesmen who sell to it regarded the business as retail. The District Court held that Idaho Sheet was outside the interstate commerce coverage of the Act and was in any case exempt. The Court of Appeals for the Ninth Circuit reversed on both points and held in favor of the Secretary. 335 F. 2d 952. We granted certiorari lim-

ited to the question whether Idaho Sheet was a retail or service establishment within the meaning of the Act. 380 U. S. 905.

In the other case before us, No. 31, the Secretary of Labor sued the Steepleton General Tire Company (Steepleton) and its president to require compliance with the minimum wage, overtime pay, and record-keeping provisions of the Act. Steepleton, which is located in Memphis, Tennessee, and employs about 47 workers, is a franchised tire dealer engaged in the sale, recapping, and repair of tires. Some of Steepleton's income derives from dealings with private customers but more than half the gross income comes from sales and repairs of tires furnished to businesses operating heavy industrial or construction vehicles or operating fleets of trucks; apparently a sizable though unspecified portion of these commercial customers operated their equipment in interstate commerce.

The District Court determined that Steepleton came within the interstate commerce coverage of the Act, and that issue is no longer in the case. Alleging itself to be exempt under § 13 (a)(2), Steepleton showed that 75% or more of its sales were not for resale and that the industry's predominant and longstanding use of the word retail applied that term to all tire sales not for resale, despite the commercial character of the tires and the established pattern of quantity discounts. The only explanation offered for this use was that it conformed to many state sales tax statutes. The Secretary showed that the industry sometimes used the word retail in other senses that excluded commercial sales and that commercial customers of Steepleton did not regard their purchases as retail transactions. The District Court held Steepleton to be entitled to the exemption. The Court of Appeals for the Sixth Circuit affirmed the District Court in all respects, 330 F. 2d 804, and we

granted certiorari at the behest of the Secretary to consider whether Steepleton qualified as a retail or service establishment. 380 U. S. 904.

The approach of the Sixth Circuit, which took industry usage as controlling, and that of the Ninth Circuit, which rejected it as the sole test, represent irreconcilable interpretations of the critical statutory language. While support can be mustered for both views, we believe the Ninth Circuit is correct and on this point follow our earlier decision in *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290. After rejecting the industry's usage as controlling, we face the further difficult question of what criteria do determine when business transactions are retail under the Act; to this question it is still less easy to return a clear-cut answer, but our analysis of the matter leads us to conclude that neither Idaho Sheet nor Steepleton qualifies as a retail or service establishment.

## II.

To construe the present language of the exemption demands a knowledge of its origins. Section 13 (a)(2), as it appeared in the 1938 enactment, used the present phrase "retail or service establishment" to delimit the exemption but did not further define the concept.[5] The Department of Labor's Wage and Hour Administrator initially made his interpretation of the retail exemption known through an Interpretative Bulletin and through various official statements.[6] To summarize very gener-

[5] The 1938 version read: "(a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1067.

[6] This Bulletin, designated No. 6, appears along with other official statements in various editions of the BNA Wage and Hour Manual (hereafter cited as WH Manual), *e. g.*, 1942 edition. The Secretary's present views are stated in 29 CFR §§ 779–779.515 (1965 ed.).

ally, the Administrator viewed a retail establishment as one selling goods or services to private individuals for personal or family consumption; sales of these same goods or services to businesses or state agencies remained retail if sold at the normal price charged private consumers or in quantities a private consumer would buy. See Interp. Bull. No. 6, ¶ 14, in 1942 WH Manual, p. 330. However, there were deviations from this consumer-goods standard in favor of employers, notable instances being the exemption of farm implement dealers and linen supply firms supplying commercial customers. See Statements of the Administrator, in 1944–1945 WH Manual, pp. 469–470.

In 1946 this Court decided *Roland Co.* v. *Walling*, 326 U. S. 657, holding *inter alia* that a business engaged in commercial wiring, electrical contracting for industry, and repair and replacement of electric motors and generators did not constitute a retail or service establishment. The opinion used considerable language suggesting that no sale of any article for business or profit-making use as opposed to personal consumption could qualify as a retail sale, a position which supported the result but went far beyond a necessary holding. See 326 U. S., at 673–677. This case, and several others in this vein,[7] prompted the Administrator to report to Congress that certain hitherto exempt classes of business were endangered—notably farm equipment dealers—and to recommend amending legislation. See 1948 Wage and Hour Division, Annual Report, pp. 120–121.

The Administrator proposed, so far as immediately relevant, to define a retail establishment as one deriving

[7] See *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173; *Boutell* v. *Walling*, 327 U. S. 463. See also *McComb* v. *Factory Stores Co.*, 81 F. Supp. 403, *McComb* v. *Diebert*, 16 CCH Labor Cas. ¶ 64,982.

75% of its income from retail sales and then to define as retail sales those made to private individuals for personal or family consumption, sales of the same items to any other customer if not for resale and if similar in type and quantity, and sales to farmers of goods of the type and quantity used on the ordinary farm. When Congress convened in 1949, a number of bills were introduced to amend the Act in various respects. The bill reported out by the House committee and the substitute measure first debated by the House adopted the Administrator's basic proposal, but a further substitute backed by an opposing coalition and introduced as an amendment during the debates finally prevailed and was sent to the Senate.[8] This bill as passed contained the definition of exempt retail and service establishments that became law in 1949 and which remains the law today.[9] The Senate during the debate of its own committee-reported bill, which did not amend the retail exemption, amended the Senate bill to conform to the House's revision of § 13 (a)(2).[10] Thus, when the House-Senate conference committee met to iron out other differences in their respective versions of the legislation, uniformity in the amendment to § 13 (a)(2) already existed. The debates on the retail exemption in each House were sub-

[8] The bill reported out of committee was H. R. 3190, 81st Cong., 1st Sess., accompanied by H. R. Rep. No. 267. The first substitute was H. R. 5856, brought to debate by H. R. Res. 183. The final, successful version retained the number H. R. 5856 but was drawn from H. R. 5894. See generally 6 BNA Lab. Rel. Rep., p. 90:459 (1961).

[9] The only difference between the 1949 version of § 13 (a)(2) and current law derives from the 1961 amendment to the section, which is not relevant in this case. See n. 4, *supra*, and accompanying text.

[10] The bill reported out of committee was S. 653, 81st Cong., 1st Sess., accompanied by S. Rep. No. 640. The amendment was offered at 95 Cong. Rec. 12491 and passed at 95 Cong. Rec. 12520.

stantial and several legislative documents construe the amended section.[11]

In light of the legislative history, the first question to be faced is whether the 1949 amendment requires the Secretary to treat as retail any sale of goods or services not for resale that is most customarily described or labeled as a retail transaction by those in the industry, acting of course in good faith. If the answer were yes, then both Idaho Sheet and Steepleton would deserve exemptions without more ado, since admittedly the predominant or sole usage of those in the industry applied the term retail to the questioned sales. It should not be said that this reading is without support. Most importantly, it would appear to follow from the most literal reading of the statute; the phrase "recognized as retail . . . in the particular industry" well lends itself to an inquiry into how the businessmen concerned term their dealings. Some statements in the debates explicitly foster this reading, for example, the comment by Senator Holland who sponsored the amendment in the Senate that under his approach, "for different commodities . . . we have to find the definition which is understood by the people dealing in that industry." 95 Cong. Rec. 12519.[12] We do not agree with the Government

[11] The principal debates appear at various points in 95 Cong. Rec. 11002–11203 (House), 12490-12520 (Senate). No initial committee reports discuss the ultimately successful version of § 13 (a)(2) but a pertinent statement of the House members of the conference committee appears in H. R. Conf. Rep. No. 1453, 81st Cong., 1st Sess., pp. 24–26 (hereafter cited as H. R. Conf. Rep.). There is also a relevant but less authoritative statement of the majority of Senate conferees (hereafter cited as Senate Conf. Majority Statement) appearing at 95 Cong. Rec. 14877.

[12] Other comments in some measure favoring the most literal construction are those assuming that each industry has an established understanding of what is a retail sale, *e. g.*, 95 Cong. Rec. 12502 (remarks of Senator Holland), 12516 (remarks of Senator

that this reading is necessarily infirm because the Secretary and courts may have to seek a standard or predominant use of the word retail among several uses extant in the industry. Certainly we do not agree with the further suggestion that this literal reading must give the industry self-determination as to whether the exemption applies; courts are not incompetent to distinguish between a legitimized usage fixed by established practice and one recently instituted with the aim of avoiding the law.

On balance, however, the arguments against this literal reading are more persuasive. At the start, such a reading would attribute to Congress a purpose going well beyond its reiterated explanation that the amendment was designed to overturn the sweeping principle of the *Roland* case. The legislative history is replete with evidence that the target of the amendment was *Roland*'s proposition that no sale to a business purchaser could be a retail sale, which Senator Holland condemned by comparing the different status it gave to the sale of a batch of towels to a housewife and the same sale to a hotelkeeper. 95 Cong. Rec. 12494.[13] Further, for every suggestion in the debates that Congress intended also wholly to revamp the exemption by substituting an overriding industry-usage test, there are statements that

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Taft); those few which seem to equate "recognized as retail" with "regarded as retail," 95 Cong. Rec. 11003 (remarks of Mr. Lucas, sponsor of the prevailing version in the House), 12502 (remarks of Senator Holland); and one or two suggesting that a discount sale may qualify as retail, 95 Cong. Rec. 11003 (remarks of Mr. Lucas), 11199 (remarks of Mr. McConnell).

[13] See House Conf. Rep., p. 24 ("This clarification [the amended § 13 (a)(2)] is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co.* v. *Walling* . . . ."); 95 Cong. Rec. 11003 (remarks of Mr. Lucas); 95 Cong. Rec. 11203 (remarks of Mr. Celler).

point in the other direction. Thus, Senator Holland observed that his amendment would not undo the commonly held view that quantity sales at discount prices are generally nonretail.[14] It was said that the "recognizing" is done by the Administrator and the courts as well as the merchant, 95 Cong. Rec. 12510 (remarks of Senator Holland), and that due weight must be given to the "actual practice" in the industry, Senate Conf. Majority Statement, 95 Cong. Rec. 14877, and the "well-settled habits of business," 95 Cong. Rec. 12510 (remarks of Senator Holland). The lists set forth of potentially retail businesses include almost only those selling consumer goods and services. See House Conf. Rep., p. 25 (quoted p. 12, *infra*); 95 Cong. Rec. 11003–11004 (remarks of Mr. Lucas); 95 Cong. Rec. 12502 (remarks of Senator Holland). There are denials that the industries' own interpretations of a retail sale will be decisive.[15]

The conclusive consideration for us in rejecting the industry usage test is that it would compel results flatly inconsistent with those Congress explicitly contemplated

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[14] "Of course if . . . [a sale is 'made in such quantity that discounts are allowed'] it comes in the category of wholesale sales." 95 Cong. Rec. 12501. Perhaps more ambiguously, Senator Holland also stated: "If sales were made in sufficient quantity so there would be a discount and they would be regarded not as retail sales, but as wholesale sales, they would lose their exemption." 95 Cong. Rec. 12497. See also 95 Cong. Rec. 12505. But cf. 95 Cong. Rec. 11003 (remarks of Mr. Lucas).

[15] "Mr. DOUGLAS. I understand that the interpretation which would be made would be that given to 'retail sale' by a trade association.

"Mr. HOLLAND. That is one criterion, of course; but I do not believe the Senator from Illinois, and certainly not the Senator from Florida, would wish to delegate full authority in the matter to a trade association or other interested group." 95 Cong. Rec. 12501.

See also 95 Cong. Rec. 12510 (remarks of Senator Holland).

and might indeed work a major revolution in the Act's coverage not acknowledged in any legislative statement or report before us. The prime example of this threatened inconsistency is the problem presented to this Court in 1959 by *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, where a business making small personal loans and purchasing conditional sale contracts from retailers claimed to be an exempt retail or service establishment. Although the company introduced persuasive evidence that the industry regarded its transactions as retail, the Court denied the exemption in the face of the legislative history indicating a limited purpose for the 1949 amendment and containing an express statement that "[t]he amendment does not exempt banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc., because there is no concept of retail selling or servicing in these industries." House Conf. Rep. pp. 25–26. See Senate Conf. Majority Statement, 95 Cong. Rec. 14877. If weight is to be given to statements about the nonretail status of quantity sales at discounts, see n. 14, *supra*, congressional intent would be similarly frustrated by the truck tire industry's retail designation of all sales not for resale no matter how great the quantity and discount. In view of the use of the word retail in the truck tire and credit industries, it would hardly be surprising to find that newspaper, telephone, or gas and electric companies label their sales to consumers as retail. Yet the legislative history is so explicitly opposed to the extension of the retail exemption to such businesses as to provide the final argument against adopting an industry usage test that could dictate that result.

Since we reject the industries' usage as the single touchstone, the question arises what meaning is to be given to the term retail. In approaching this question

we agree with the Secretary that it is generally helpful to ask first whether the sale of a particular type of goods or services can ever qualify as retail whatever the terms of sale; if and only if the answer is affirmative is it then necessary to determine the terms or circumstances that make a sale of those goods or services a retail sale.

Plainly the typical retail transaction is one involving goods or services that are frequently acquired for family or personal use. As examples of sales that could qualify as retail, the House Conference Report lists those made "by the grocery store, the hardware store, the coal dealer, the automobile dealer selling passenger cars or trucks, the clothing store, the dry goods store, the department store, the paint store, the furniture store, the drug store, the shoe store, the stationer, the lumber dealer, etc. . . . ." House Conf. Rep., p. 25 (sale of farm machinery is another example given). See also 95 Cong. Rec. 11003-11004 (remarks of Mr. Lucas); 95 Cong. Rec. 12502 (remarks of Senator Holland. Of course Congress' conceded intent to overrule the *Roland* principle means sales of such goods or services can be retail "whether made to private householders or to business users," House Conf. Rep., p. 25, but the goods and services listed nearly all share the common characteristic that they are often purchased by householders. The legislative recital of telephone, gas and electric, and credit companies along with a number of others as businesses outside the exemption, see p. 11, *supra,* demonstrates that not everything the consumer purchases can be a retail sale of goods or services, but the breadth of this qualification need not here be explored.

What is important for this decision is that Congress also intended that the retail exemption extend in some measure beyond consumer goods and services to embrace certain products almost never purchased for family or noncommercial use. An indisputable example is the sale of farm implements. See House Conf. Rep., p. 25.

Another instance is trucks, at least of some varieties, whose "retailability" is assumed in the legislative history, *e. g.*, 95 Cong. Rec. 12497 (remarks of Senator Holland), and confirmed by the presence of another exemption in the Act that would otherwise be difficult to understand.[16] See also 95 Cong. Rec. 12495 (remarks of Senator Holland) (retailability of modest office desk). We cannot draw a precise line between such articles and those like industrial machinery which can never be sold at retail, see House Conf. Rep., p. 26, but a few characteristics of items like small trucks and farm implements may offer some guidance: their employment is very widespread as is that of consumer goods; they are often distributed in stores or showrooms and by means not dissimilar to those used for consumer goods; and perhaps it can be said that they are very frequently used in commercial activities of limited scope. While the list of strictly commercial items whose sale can be deemed retail is presumably very small, their existence precludes use of the uncomplicated "consumer goods" test proposed by the Administrator in 1949. See pp. 6–7, *supra*.

Within the category of goods and services that can be sold at retail, naturally not every sale can be so classified. The exemption itself excludes any sale for resale and beyond that, references in the legislative history, n. 14, *supra*, and common parlance certainly suggest that the term retail becomes less apt as the quantity and the price discount increases in a particular transaction. Again,

[16] Section 13 (a)(19), added in 1961 by 75 Stat. 73, 29 U. S. C. § 213 (a)(19) (1964 ed.), exempts from the minimum wage and overtime pay requirements "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements" regardless of whether the establishment meets the further tests of § 13 (a)(2), notably those added in 1961, see n. 4, *supra*, and accompanying text. Quite evidently this section contemplates that a business primarily selling trucks may be a retail establishment.

we do not believe the word-usage of the industry must be given conclusive force. The legislative comments on discounting just cited are to the contrary; and the statute cannot easily be read to make usage control whether a particular sale is retail after we have rejected that test in deciding whether sale of a given item can ever be retail. The Secretary has in fact quite properly looked carefully at usage and practice in each industry before taking a position, 29 CFR § 779.323 (1965), but he cannot be hamstrung by the terminology of a particular trade. In view of the diversity of structure and marketing practices in different industries, flexibility is certainly appropriate, and we do not here further attempt to adduce general rules. We do note that the considerable discretion possessed by the Secretary as the one responsible for the actual administration of the Act should not be understressed. *Boutel* v. *Walling*, 327 U. S. 463, 471; see *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549.

III.

In light of the premises now established, resolution of the two cases before us can be accomplished readily. Turning first to Idaho Sheet Metal Works, we believe it is disqualified as a retail establishment by the 83% of its gross income derived from metal work relating to the potato processing equipment. The company has stressed the wide public it serves, the display racks and other retail facilities in its building, the irregular intervals at which work on the potato equipment is performed, and the company's lineage tracing back to the "tin shops" of yesterday. All these factors may bear upon the classification of its other sales, and if those were its sole business or three-quarters of it the company might well deserve the exemption. But § 13 (a)(2) is explicit in its treatment of establishments whose sales are variegated: a business is characterized by its sales and no more than

25% of the dollar volume may derive from sales designated nonretail without loss of the exemption. See n. 2, *supra*. In this instance 83% of the gross income is made by sale or servicing of the potato processing equipment and we do not believe those transactions before us can be labeled retail whatever the particular terms.

This last conclusion follows naturally from the admitted facts. The pretrial order described the potato equipment fabricated and maintained by Idaho Sheet as vats, storage tanks, hoods, elevator buckets, and chutes. Hoods were described at trial by one purchaser as being "five feet square on the bottom and about four feet high where they go to the vent stacks." He also testified that the tanks held as much as "5,000 pounds of peeled potatoes," and that chutes were about 12 feet long. If this testimony is not fairly representative of the nature of the equipment under scrutiny, there is no indication of that from Idaho Sheet, upon whom lies the burden of establishing the facts requisite to an exemption. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U. S. 388. The type of equipment described plainly appears to have no private or noncommercial utility. Nor does it bear much resemblance to those strictly commercial articles earlier named that may be sold at retail. Unlike small trucks and farm equipment, the market for these goods is highly limited, and far from being stock items purchased off the shelf, these articles were generally fabricated to meet individual specifications.[17] In the 83% of its business relating to the potato equipment, Idaho Sheet seems hardly distinguishable from "an establishment engaged

[17] The company relies upon *Wirtz* v. *Modern Trashmoval, Inc.*, 323 F. 2d 451, in which the Fourth Circuit as an alternative ground of decision held a trash collection business to be a retail or service establishment under the Act. We need go no further than to say the case is quite distinguishable; trash removal is not only a widespread need in the commercial world but is required by private families.

in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods," which the House Conference Report flatly stated could not be exempt. House Conf. Rep., p. 26. Since in our view this potato equipment cannot be the subject of a retail sale, we have no occasion to consider the company's claim that the pricing and quantity of its particular sales of the equipment conform to retail standards.

The second case, involving the Steepleton tire business, is in some respects more intricate. The Government has alleged, and Steepleton does not deny, that better than half the company's dollar volume derives from sales to companies operating fleets of commercial vehicles and other heavy industrial machinery such as earth-moving equipment. The Government's first ground for withholding the exemption is that tire transactions relating to large trucks and industrial vehicles are intrinsically nonretail whatever the terms. It analogizes these vehicles to industrial machinery and then would treat the tires just as the trucks. And it stresses the ties between these vehicles and interstate commerce.

Admitting that the argument has force, we do not accept it. Among the few strictly commercial articles that Congress pretty plainly viewed as retailable were trucks in at least some varieties, as we have already shown. No reason appears why the sale of tires for those trucks should be distinguished and not allowed to qualify as retailable items. The strength of the Government's position lies in its readiness to separate big trucks and tires from little trucks and tires. The Secretary, however, seemingly has chosen not to classify truck tires on this basis but instead treats all truck tires as capable of being sold at retail.[18] A decision of this

[18] 29 CFR § 779.373 (1965) relevantly provides that for purposes of § 13 (a)(2) "all sales of tires, tubes, accessories and tire repair

kind, no doubt turning in part on problems of administration and facets of industry practice, clearly implicates the Secretary's discretion, and we see no cause to disturb its exercise in this case.

Steepleton is, nevertheless, deprived of the retail establishment exemption because—as the Government alternatively contended—it has failed to show that the tire dealings in question were made on terms and in circumstances that qualify them as retail within the Secretary's guidelines. The guidelines class as nonretail all sales to fleets of five or more vehicles at "wholesale prices," a wholesale price being defined as that charged on sales for resale or on sales to 10-vehicle fleets. See n. 18, *supra*. These guidelines, reportedly designed after inquiry into industry practices, are quite evidently aimed at excluding from the retail category sales generally made at significant discounts and in quantity. Given the common conception of the term retail and references in the legislative history to discount sales, see n. 14, *supra*, we see no reason not to sustain these guidelines; indeed, the company does not even appear to discuss them, save as is implicit in its claims that the Secretary's position here does not correspond to word usage in the industry.

In concluding that Steepleton has not proved itself exempt, a certain indefiniteness in the record should be noted. The Government showed at trial that many of

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services, including retreading and recapping" are classified as retail, with a series of exceptions including:

"(d) Sales to fleet accounts at wholesale prices: . . . a 'fleet account' is a customer operating five or more automobiles or trucks for business purposes. Wholesale prices . . . are prices equivalent to, or less than, those typically charged on sales for resale. . . . If the establishment makes no sales of truck tires for resale, the wholesale price . . . [is] the price charged . . . on sales of truck tires to fleet accounts operating 10 or more commercial vehicles, or if the establishment makes no such sales . . . [it is] the price typically charged in the area on [such] sales . . . ."

the sales were to large fleets, that a number of purchasers said they received discounts, that the practice in the industry was to grant significant discounts for fleet sales, that some sales were for resale or pursuant to bids to public agencies, and other facts directed at showing nonexemption under the guidelines. Despite this evidence, there is unclarity as to the precise percentages of dollar volume attributable to the various sales that the guidelines label nonretail. However, the burden of proof respecting exemptions is upon the company, as earlier indicated, and since we uphold the Secretary's test, that burden has not been met. If Steepleton had alleged on appeal that it could meet the Secretary's standards if they prevailed, even then we would hesitate to order a remand since the Secretary's position has been known from the outset. In all events, Steepleton has not even claimed in this Court that the Secretary's standards could be met.

The judgment of the Court of Appeals in No. 30 is affirmed; the judgment of the Court of Appeals in No. 31 is reversed.

*It is so ordered.*